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**REPORTS**  
**OF**  
**CASES**

**ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT OF ERRORS**

**OF THE**

**STATE OF CONNECTICUT;**

**AND IN THE**

**CIRCUIT COURT OF THE UNITED STATES**

**FOR THE**

**DISTRICT OF CONNECTICUT:**

**WITH A SUPPLEMENT.**

---

**BY THOMAS DAY.**

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**VOLUME III.**

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**NEW-YORK:**  
**Published by Isaac Riley.**

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**1811.**

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SUPREME COURT OF ERRORS  
DISTRICT OF CONNECTICUT, ss.

(L. s.) **BE IT REMEMBERED**, That on the sixteenth day of November, in the thirty-sixth year of the independence of the United States of America, **THOMAS DAY**, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

" Reports of Cases argued and determined in the Supreme Court of  
" Errors of the State of Connecticut; and in the Circuit Court of the  
" United States, for the District of Connecticut: with a Supplement.  
" By **THOMAS DAY**. VOL. III."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."

**HENRY W. EDWARDS,**

*Clerk of the District of Connecticut.*

A true copy of Record, examined and sealed by

**HENRY W. EDWARDS**, Clerk of the District of Connecticut.



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1788

On the 17th of June 1788, the Pope issued a Bull for the purpose of settling the rights of the Holy See in the Kingdom of Sicily.

The Bull was issued in the name of the Holy Father, Pius VI.

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# CASES

ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURT  
OF

## THE UNITED STATES,

DISTRICT OF CONNECTICUT, SEPTEMBER TERM, 1807.

PRESENT, THE HON. PIERPONT EDWARDS.

ISAAC STOYEL *against* JOHN LAWRENCE and TIFFANY  
ADAMS.

Sept. 1807

THIS was an action of trespass for false imprisonment.

Plea, *not guilty*.

On the trial it appeared that one *Job Smith* had obtained a judgment, before the *Windham* county court, against the plaintiff, and had taken out an execution, dated the 13th of *May*, 1804, returnable according to law. (a) On the 25th of *August*, 1804, *Lawrence* was deputed, by the sheriff of *Windham* county, to execute it. On the 31st of *July*, 1805, *Lawrence*, with the assistance of *Adams*, arrested the plaintiff, by virtue of that execution, and kept him in confinement one or two days, when he paid the execution, and was released. The only question

An execution, after the expiration of the time within which it was made returnable, is of no force, and an arrest under it is a trespass.

(a) By statute, "all writs of execution shall be made returnable within sixty days, or to the next court, (in case sixty days are remaining between the date of the execution and the next court,) at the election of him that prays it out." 1 Stat. Con. tit. 63. c. 1. s. 10

Sept. 1807. in the case was, whether the execution gave the officer any authority to make the arrest.

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*Ingersoll*, for the plaintiff, contended, that the time within which the execution was returnable having expired, it became a dead letter, and that the arrest under it was a trespass.

*Daggett*, for the defendants, contended, that the time limited for the return of an execution is only for the benefit of the creditor. When that time is expired, the officer becomes liable to him. But with regard to the debtor, it makes no difference. His indebtedness is the same, till the execution is satisfied. He may be taken at any time. The right of the creditor to renew his execution at pleasure, shows that the limitation is in his favour.

Further, an officer may justify under a process, which is either irregular or erroneous, provided it be not absolutely void. In the following cases, it was holden, that though the process was irregular, yet it was sufficient for the sheriff to make the arrest, and, therefore, he was liable for an escape: *Howard v. Pitt*, (a) *Shirley v. Wright*, (b) *Ognell v. Paston*, (c) and *Bushe's case*. (d) A *capias ad satisfaciendum*, made returnable at a day, which falls out of the term, is not void, but only liable to be set aside, upon motion, for irregularity. *Campbell v. Cumming et al.* (e) In this state, an execution after the return day, is not more irregular than the executions in the cases cited. The reason why, in *England*, an execution may not issue after the expiration of a year and a day, without a *scire facias*, is, that the court concludes, *prima facie*, that within that time the judgment is satisfied. Here, a *scire facias* to obtain execution is unknown; but in lieu of it, we take out an *alias*; and if the judgment has been satisfied, the debtor is entitled to an *audita querela*.

*Ingersoll*, in reply, said, there was a material difference

(a) 1 *Salk.* 261. (b) 1 *Salk.* 273. 2 *Salk.* 700. 2 *Ld. Raym.* 775.  
(c) *Cro. Eliz.* 165. (d) *Cro. Eliz.* 188. (e) 2 *Burr.* 1187.



between an execution in *England*, after a year and a day, and an execution here, which has run out. In the former case the officer does not know but that the execution had been stayed by a writ of error, in which case it would be good; it is good upon the face of it; and he ought not to be hurt for executing it. But, in the latter case the execution is bad upon the face of it. He knows that it can give him no authority.

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EDWARDS, J. after remarking to the jury, that the case depended upon a mere question of law, directed them to find for the plaintiff. The execution, he said, gave the officer no authority whatever, and, consequently, formed no defence.

A verdict was found for the plaintiff, accordingly.

GEORGE CODWISE, jun. PETER LUDLOW and JAMES CODWISE against CHAUNCEY GLEASON, ELIJAH COWLES, JONATHAN COWLES, GAD COWLES, SETH COWLES and MARTIN COWLES.

IN the writ, the plaintiffs were described as being "all of the city and county of *New-York*, in the state of *New-York*, and citizens of said state of *New-York*, late (viz. on or about the 1st of *March*, 1796, and for a long time before and since) merchants in company;" and the defendants as being "all citizens of the state of *Connecticut*, resident in said state," and as being "lately (viz. on or about the 1st day of *March*, 1796, and for a long time before and since) merchants in company," &c.

An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be bro't before the circuit court of the *U. States*, though the maker and payee of such note are citizens of the same state.

The declaration alleged, "that on or about said 1st day of *March*, 1796, the defendants possessed a certain paper writing, purporting to be a promissory note, payable to them the defendants, by one *Erastus Gay*, in the words and figures following, viz.

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"On the first day of *October* next, I promise to pay *Gleason & Cowles*, or order, at the *Hartford* bank, nine hundred and forty-five dollars, value received in the city of said *Hartford*, this 14th day of *November*, 1795.

§945.

*Erastus Gay.*"

"And afterwards, *viz.* on or about the said 1st day of *March*, 1796, the defendants (being so possessed of such paper writing, and the said sum of nine hundred and forty-five dollars being unpaid) did by their endorsement, by them made on said paper writing, by their said firm of *Gleason & Cowles*, order and appoint the contents of the said paper writing (being the said sum of nine hundred and forty-five dollars) to be paid to the plaintiffs, for value received, according to the tenor of said paper writing, by their endorsement thereon signed with their said names."

The plaintiffs then averred, "that on the 1st day of *October*, 1796, and also on the 3d day of the same month of *October*, at the uttermost convenient time of said days, at said *Hartford*, they showed and exhibited said paper writing and endorsement at said *Hartford* bank, (being the place where said note was payable as aforesaid,) and then and there, on both said days, demanded payment of the aforesaid sum of nine hundred and forty-five dollars, according to the tenor of said paper writing, and the endorsement thereon: but said *Erastus Gay* neglected to pay the same; and neither the same, nor any part thereof hath ever been in any way paid, and said *Erastus* hath ever refused, and still refuses to pay the same. Whereupon the plaintiffs, on the 4th day of *October*, 1796, gave notice of the premises to the defendants, and required of them payment of the said sum of nine hundred and forty-five dollars, mentioned in said paper writing; and afterwards, *viz.* on the 31st day of *October*, 1796, the plaintiffs caused an action to

be commenced on said paper writing, in the name of the said *Chauncey, Elijah, Jonathan, Gad, Seth and Martin*, against the said *Erastus Gay*, by writ of that date, returnable to the city court, holden within and for the city of *Hartford*, in the county of *Hartford*, on the second *Tuesday of December, 1796*; and said writ was duly served and returned to said city court. And in the declaration in said action, it was and is alleged, that the said paper writing was a promissory note, under the hand of the said *Erastus*, by him well executed, within the limits of said city of *Hartford*, and that thereby the said *Erastus* promised the said *Chauncey, Elijah, Jonathan, Gad, Seth and Martin*, by their said name of *Gleason & Cowles*, for value received, to pay to them, at the said *Hartford* bank, (which then was and is in said city of *Hartford*,) the said sum of nine hundred and forty-five dollars, on the 1st day of *October* next after the date of said writing; and that the said *Erastus* had never, in any way, performed the said promise. And such proceedings were had in the said action, that the same, by divers legal removes, came regularly before the superior court, holden at *Hartford*, within and for the county of *Hartford*, on the second *Tuesday of February, 1797*, when and where said parties to said action appeared therein, before said court, and the said *Erastus* pleaded thereto, that he did not assume and promise in manner and form, as in said declaration was alleged; on which plea, issue was then and there joined, and said action, by legal continuances, came before the superior court holden at *Hartford*, on the 3d *Tuesday of February, 1803*, when and where the said parties to said action appeared therein, before said court, and with their evidence and exhibits, and by their counsel were fully heard, before said court and the jury attending said court, on the issue joined in said action, which issue, being then and there, by said court, committed to said jury, said jury found a verdict thereon, that the said *Erastus* did not assume and promise, in manner and form, as in said declaration was

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alleged, which verdict was then and there returned to, and accepted by, said court; and thereupon it was, by said court, at their said term, considered and adjudged that the said *Erastus* did not assume and promise, in manner and form as the plaintiffs had alleged, and that he should recover of the said *Chauncey, Elijah, Jonathan, Gad, Seth, and Martin*, his costs of said suit, allowed and taxed at sixty-two dollars and ten cents, as by the files and records of said court, ready in court to be produced, appears; and in prosecuting said suit, the said *Codwise, Ludlow & Co.* incurred great charges and expenses, amounting to the sum of two hundred dollars, of which the defendants aforesaid, viz. on the first day of *March*, 1803, had notice."

The plaintiffs further stated, "that the said *Erastus Gay* never did, in and by the aforesaid paper writing, (purporting to be a promissory note as aforesaid,) assume and promise, for value received, to pay to them the said *Chauncey, Elijah, Jonathan, Gad, Seth and Martin*, the sum of nine hundred and forty-five dollars therein mentioned, nor any part thereof; and said paper writing never was the promissory note of said *Erastus*. But the plaintiffs received said paper writing as endorsees thereof as aforesaid; and paid therefor the full amount of the said sum of nine hundred and forty-five dollars as aforesaid, believing it to have been the promissory note of him the said *Erastus*, and believing that the said *Erastus*, in and by said paper writing, assumed and promised, for value received, to pay to the said *Chauncey, Elijah, Jonathan, Gad, Seth and Martin*, the said sum of nine hundred and forty-five dollars, according to the tenor of said paper writing, and the defendants endorsed and assigned the same as aforesaid, as and for a good and valid promissory note, payable to them by the said *Erastus* according to the tenor thereof.

“ And by means of the premises, the defendants became liable to pay to the plaintiffs the aforesaid sum of nine hundred and forty-five dollars, (specified in said paper writing,) and the lawful interest thereon from and after the said 1st day of *October*, 1796, and also the aforesaid charges and expense of prosecuting the aforesaid suit against the said *Erastus Gay*; and being so liable, the defendants, in consideration thereof, afterwards, viz. on or about the first day of *March*, 1803, at said *Hartford*, upon themselves assumed, and to the plaintiffs promised, to pay to them the said sum of nine hundred and forty-five dollars, and said interest thereon, and the aforesaid charges and expense, within a reasonable time afterwards, when they should be thereto required. But the defendants, and each of them, their assumption and promise aforesaid not regarding, have never paid to the plaintiffs, or either of them, the aforesaid sum of nine hundred and forty-five dollars, and the interest thereon, and said charges and expense, or any part thereof, though they have been often by the plaintiffs thereto required, and though a reasonable time for that purpose hath long since elapsed.” The damages were laid at three thousand dollars.

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The defendants pleaded in abatement, that *Erastus Gay*, named in the plaintiffs' declaration, who made and executed the note on which, &c. was at the time he executed said note, and ever since has been, an inhabitant of *Farmington*, in the district of *Connecticut*, and the note was executed at *Hartford* in said district; and that said *Gleason & Cowles*, the defendants, to whom said note was made payable, were at the time of making said note, and ever since have been, inhabitants of said district of *Connecticut*, and there residing; and at the time of endorsing their names on the back of said note, the defendants were, and ever since have been, inhabitants of said district of *Connecticut*, and there residing; and that the defendants endorsed their names on said note at



Sept. 1807. said *Hartford*, and there delivered said note to *Pieleg Sanford*, then of said *Hartford*, since deceased, and thereby assigned said note to said *Sanford*. The plea concluded by alleging, that this court had not jurisdiction of this action, and praying judgment that it should be dismissed.

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To this plea there was a demurrer, and joinder in demurrer.

*Goodrich* and *Griswold*, in support of the plea, relied upon the following clause of the 11th section of the act to establish the judicial courts of the United States: "Nor shall any district or circuit court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action* in favour of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." (a) It appears from the declaration, that the note, which is the foundation of this suit, was made in *Connecticut*, and that the maker and payees belonged to *Connecticut*. If this note had not been assigned, it is clear that no suit could have been brought to recover its contents before this court. The restrictive clause of the act, therefore, is applicable to this case, and is decisive against the jurisdiction.

*Daggett* and *E. Perkins*, contra.

The plaintiffs in this case are citizens of *New-York*; the defendants of *Connecticut*. This court has jurisdiction, unless the defendants can bring their case within the restrictive clause of the 11th section of the judiciary act. The limitation of the general jurisdiction of the court is to be construed *strictly*. But that clause is not applicable, either in its letter or spirit, to this case. The suit

(a) *Stat. U. S. v. 1. p. 55, 56. Swift's edit.*

is not brought to recover the contents of any promissory note, or other *choses in action*. Sept. 1807.

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In the first place, the declaration states expressly, that the writing in question never was the promissory note of *Erastus Gay*. It, indeed, purported to be, but, in truth, was not.

EDWARDS, J. The consideration, that the note is stated not to have been a valid one, will not have much weight with the court.

In the next place, if the note had been genuine and valid, still this suit might be sustained in this court. The defendants, by the assignment, entered into a *new contract* with the plaintiffs, for the breach of which the present action is brought, not for the non-payment of the note by the maker. The contract between the maker and payee, and that between the endorser and endorsee, are distinct and essentially different. To the latter the restrictive clause of the act does not extend.

The *reason* of the law is, that where a man enters into a contract, of which this court has not jurisdiction, he shall not afterwards be subjected to its jurisdiction on account of such contract, by the acts of other persons. But this reason is applicable only to the case of the *maker*.

But it may be said, that if the plaintiffs recover in this case, the rule of damages will be the contents of the note. Admitting this, it does not follow that this case is within the restrictive clause. It is surely too much to say, that the clause extends to every case where the plaintiff, if he prevails, will recover the same amount with the contents of the note. Suppose a note executed by *A.* to *B.*, both citizens of *Connecticut*. *C.*, a citizen of *Massachusetts*, enters into a contract with *A.* by the terms

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V

GLEASON,

of which he is to pay and take up *A.*'s note. It will not be contended, that the clause in question would deprive the circuit court of jurisdiction over this contract; and yet, if *C.* were to sue upon it and recover, the rule of damages would be the contents of *A.*'s note. Or, suppose *C.*, in the case put, should tortiously take the note from *B.*, and *B.* should bring trover for it and recover; the rule of damages would be the amount of the note; but might not the circuit court have jurisdiction?

But we deny that the rule of damages in the case before the court, will be the contents of the note merely: The rule of damages will be the damages sustained by the breach of the contract implied by the endorsement; which may include the expenses of protest, of a suit against the maker, &c. At any rate, the damages are not necessarily the precise amount of the note; which is sufficient for our purpose.

2. The averments in the plea are insufficient. It is not alleged, that the original parties to the note were not citizens of different states. If they *were* citizens of different states, then a suit might have been prosecuted in this court before any assignment was made; and, of course, the statute has no bearing upon this case.

Again, the plea is defective, as it does not show what court has jurisdiction.

EDWARDS, J. I have no doubt as to the jurisdiction of the court in this case; but I am not prepared to give a formal opinion on a point of this importance, at this time. My opinion will be, that the plea in abatement is insufficient. It appears to me, that the argument in favour of the jurisdiction is irresistible.

On a subsequent day, his honour delivered an elaborate opinion on this point; but the reporter heard only

a part of it, and was not, at that time, in a situation which admitted of his taking any minutes.

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The case was afterwards continued to the next term, for trial on the merits.



# CASES

ARGUED AND DETERMINED

IN THE

## CIRCUIT COURT

OF

### THE UNITED STATES,

DISTRICT OF CONNECTICUT, APRIL TERM, 1808.

PRESENT, THE HON. { BROCKHOLST LIVINGSTON.  
PIERPONT EDWARDS.

---

April, 1808. GEORGE CODWISE, jun. PETER LUDLOW and JAMES  
CODWISE *against* CHAUNCEY GLEASON, ELIJAH  
COWLES, JONATHAN COWLES, GAD COWLES, SETH  
COWLES and MARTIN COWLES.

Though a note is void as against the maker, it may be good against an endorser, in favour of an endorsee, who took it relying upon the endorsement. The contract made by endorsement, extends to all future endorsee, even where notes are not negotiable.

THIS case was argued on a plea in abatement, at the last term; a *respondeas ouster* was ordered; and the case continued to this term, for trial on the merits.

The declaration having been already stated at length, it may be sufficient to refer to that statement, <sup>(a)</sup> without repeating it here; but the case will be better understood by a statement of the following facts, in addition to those which appear on the declaration:

*Erastus Gay* made a contract for a title to some Georgia lands with *Peleg Sanford* and another person, according to the terms of which he was obliged to give them a note for nine hundred and forty-five dollars,

(a) *Ante*, p. 3.



payable at the *Hartford* bank, with a good endorser. To comply with this contract, *Gay* induced *Gleason & Cowles* to endorse the note in question; and after it was so endorsed, he delivered it to *Sanford*. It was then sold to *Timothy Burr*, but without any endorsement; and by him it was again sold to *Codwise, Ludlow & Co.* for goods, and without any endorsement by *Burr*. It was afterwards endorsed by *Codwise, Ludlow & Co.* and sent to *John Dodd* of *Hartford* for collection, and by him endorsed and lodged in the bank. As it was not paid when it became due, demand was made of *Burr*, as well as of *Gay*, and *Gleason & Cowles*. After the note was taken from the bank, the names of *Codwise, Ludlow & Co.* were erased, they having been entered merely for the purpose of collection. The suit in the name of *Gleason & Cowles* against *Gay*, failed on the ground of fraud, and, consequently, of want of consideration in the contract, to comply with which the note was given. An action was then brought against *Burr* by *Codwise, Ludlow & Co.*, in which they claimed to recover of him as having sold, and thus become responsible for the note. His defence was, that though he sold, he did not warrant the note, but that it was received by the plaintiffs entirely at their own risk. That suit also failed; and the present action was immediately commenced.

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On the trial, after all the material facts alleged had been either admitted or proved, the counsel for the defendants offered evidence to prove, first, that this endorsement was not intended to give a general credit to the note; and, secondly, that the plaintiffs were, in reality, remote endorsees.

*Daggett*, for the plaintiffs, objected to the testimony.

This endorsement by *Gleason & Cowles* needs no explanation. It admits of none. No evidence, as to the inten-

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tion of the parties, can alter the legal nature of the instrument. This note appears to have been sent into the world under the sanction of the names of *Gleason & Cowles*. So merchants would universally understand it, and so courts will consider it.

LIVINGSTON, J. Evidence that *Gleason & Cowles* endorsed the note, and gave it back to *Gay*, in order to give him credit; and that they never negotiated it, may have some important bearing on the case. Perhaps the same fraud which procured the note to be given, was used in obtaining the endorsement; and, if so, it may be properly laid before the jury. The evidence may, therefore, be heard.

In the argument of the case, *Ingersoll* and *Griswold*, for the defendants, contended,

1. The plaintiffs cannot recover, because the note has been decided by a competent tribunal to be void. The endorsement must of course be void. The endorsement is in the nature of security; and where notes are not negotiable, it can be viewed in no other light. It is the same thing, then, as if *Gleason & Cowles* had signed this note with *Gay*, as his sureties. And it must be acknowledged that a surety cannot be holden, when the obligation of his principal is void.

2. From the testimony which has been let in, it appears that the plaintiffs are remote endorsees, and the defendants never endorsed the note to them. There is no privity of contract between the plaintiffs and defendants. To decide that upon these facts the defendants are liable to the plaintiffs, would be giving to an endorsement all the efficacy which it has where notes are negotiable. On this principle, an endorser can alter the nature of an in-

strument, and make that negotiable which was not so in its creation; which is absurd.

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*Daggett*, for the plaintiffs.

1. The contract of the endorser is, in every case, that the sum contained in the note shall be paid when due, and for this payment he pledges himself to be responsible. It makes no difference whether the note is not paid by the maker because he is unable, or because the instrument is void, or on account of any other impediment in the way of collection. Let the cause of failure of payment be what it may, the endorser is liable. If the note is forged, the endorser is still holden; and in a suit against an endorser it is not necessary to prove the hand-writing of the maker.

2. Nor is the contract made with the *next* endorsee only. It extends to all future endorsees. An endorsement in blank is a letter of credit to the whole world; and every man who trusts to it, can recover of the endorser. This principal is clearly illustrated and supported by the case of *Russel v. Langstaffe*, *Doug.* 514. where Lord MANSFIELD declared, that the defendant, by endorsing blank copper-plate checks, gave a letter of credit for an indefinite sum; and that it did not lie in his mouth to say the endorsements were not regular. Indeed, this is a direct authority to both points; for it not only decides the general liability of endorsers on account of having given their names to the world, but declares farther, that the endorser is holden, though the paper endorsed was, at the time, a mere nullity.

LIVINGSTON, J. directed the jury, that as to the first point, though he had had doubts, they were almost entirely removed. If a note were forged, the endorsement would bind the man who made it.



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The second point he declared not to have altered the decision of the case from what it would have been, if the plaintiffs were the only endorsees, and the defendants the only persons through whose hands the note had passed. *Gleason & Cowles* gave the weight of their names to the world, and must be responsible to every man who trusts to the note relying on their credit, as every subsequent endorsee must be supposed to do, from the nature of the transaction. The case is, therefore, clearly with the plaintiffs on both points.

A verdict was accordingly found for plaintiffs to recover 1,599 dollars and 20 cents damages.

HON. PIERPONT EDWARDS *against* JOHN NICHOLS.

THIS was an action of *indebitatus assumpsit*.

*Assumpsit* will lie for articles, or services, commonly charged on book.

A declaration for labour done, or services performed, generally, is good.

If a party is described as a citizen of the district of *N. York*, he is sufficiently described as a citizen of the state of *New-York*.

In *assumpsit*, though, for articles and services commonly charged on book, the parties cannot be permitted to testify.

In the writ the plaintiff was described as "of the city, county and district of *New-York*, a citizen of said district;" and the defendant as "of *Waterbury*, in the county of *New-Haven*, and district of *Connecticut*, a citizen of said district."

The first count of the declaration alleged, "that on the thirtieth day of *June* last past, at *New-Haven*, in said district of *Connecticut*, he the defendant was indebted to the plaintiff in the sum of seven hundred dollars, for divers labours and services before that time done and performed by the plaintiff, for the defendant, at his, the defendant's, special instance and request; and the defendant, at said *New-Haven*, immediately afterwards, viz. on the thirtieth day of *June* last past, in consideration of



being indebted to the plaintiff as aforesaid, assumed upon himself, and to the plaintiff faithfully promised to pay to him the aforesaid sum of seven hundred dollars, in a reasonable time thereafter, when thereto requested by the plaintiff."

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The second count stated a *quantum meruit* for seven hundred dollars, for labours done and services performed.

The third count claimed five hundred dollars for so much money laid out, disbursed and expended, by the plaintiff, for the use of the defendant, and at the defendant's special instance and request.

The fourth count was as follows: "Also for that, at *New-Haven* aforesaid, on the 30th day of *June* last past, in consideration that the plaintiff had before that time, at the special instance and request of the defendant, done and performed divers labours and services for one *Samuel C. Alcox*, of *Wolcott*, in the county of *New-Haven*, he the defendant, at said *New-Haven*, on or about said 30th day of *June*, 1805, assumed upon himself, and to the plaintiff faithfully promised to pay him therefor, as much as said services rendered and performed as aforesaid were reasonably worth; and the plaintiff further avers, that said services so rendered and performed were reasonably worth the sum of sixty dollars."

The fifth count alleged, that the defendant was indebted to the plaintiff in the sum of fifty dollars, for services before that time rendered to *Alcox* by the plaintiff, at the special instance and request of the defendant, and that being so indebted he promised, &c.

The sixth count was for fifty dollars in money, laid out by the plaintiff for the use of *Alcox*, at the special instance and request of the defendant.

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The common averments were inserted at the close.

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Plea, *non assumpsit*.

When this case came on for trial, the counsel for the defendant moved for a continuance of the case until the next term of the court, on account of the sickness of the defendant, who was then in the state of *New-York*, and unable, as was stated, to attend the trial.

LIVINGSTON, J. You must be sensible that the sickness of a party, or his inability to attend the trial, is no legal cause for a continuance.

*Ingersoll* and *Staples*, for the defendant, stated, that *Nichols* was a competent witness in this case; that they wanted his testimony; and, on that ground moved for a continuance. They insisted, that though this action is *assumpsit* in form, it still comes within the meaning of our statute, which permits the party to testify in book-debt actions. The words of the statute are, "that in all actions on book debts, that shall be tried by a jury, the jury shall well weigh and consider the credit of the parties or any other persons interested," &c.(a) This action is brought for charges made on book, and ordinarily sued for in the form of action described in our statutes as *book-debt* actions; but whether sued for in this *form* or not, the same rule of evidence must be adhered to, in order to satisfy the meaning of the statute.

They also urged, that the statute of limitations of book debts, had been construed to extend to actions of *assumpsit*. But the words of this statute, "that all such book debts as are now outstanding," &c. can with no more propriety be extended to such actions, than the words of the other statute.

(a) 1 Stat. Conn. tit. 25. c. 1. s. 2.

*Daggett and Bristol*, for the plaintiff.

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The privilege allowed by our statute, that the parties should be permitted to testify in their own case, is mutual; and it is confined to the action denominated *book debt*. The practice adopted in our state courts has never extended the privilege to any other *form* of action. It was a fundamental principle of common law, that no man should testify in his own case; and the statute which gives the privilege in question, being in derogation of the common law, is not to be extended by construction. This is true in all cases; but ought to be inviolably adhered to, when the principle of common law invaded by a statute, is a rule of evidence so important as the one under consideration.

It has been said, that the statute of limitations regarding book debts, is applicable to actions of *assumpsit*, and has been so applied. This is true, where the action of *assumpsit* is brought to recover the value of articles or services commonly charged on book. But this depends on the phraseology of the statute of limitations, which declares, with certain exceptions, "that all book debts shall not be recoverable after six years."<sup>(a)</sup> The limitation, therefore, applies to the subject matter of this action; and the statute substantially declares, that whatever may be the remedy, or the form of action adopted for the purpose, still *no book debt* shall be recovered after six years. But the statute authorizing courts to receive the testimony of the party himself, gives this privilege only in the particular *form* of action which we call book debt.

LIVINGSTON, J. If *Nichols* were present, he could not testify in this case under your statute; there is no reason, therefore, for the continuance of the case.

(a) 1 Stat. Conn. tit. 25. c. 2.

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The next day the case come on for trial. As it was conceded by the counsel for the plaintiff, that the demand in question was for services performed as an attorney and counsellor at law, and for disbursements in several cases in which he had been thus employed, *Ingersoll* and *Staples* urged an objection to the admission of any testimony to support the declaration, for the following reasons:

1. An action of *assumpsit* will not lie to recover the value of such articles delivered, or such services performed, as are the proper subject of *charge on book*. The remedy, in such cases, is by action of book debt, and by that only. This remedy has grown up with the state of *Connecticut*, and has had an important influence upon our modes and habits of business. All persons, taking it for an established position, that they can support their charges by their own testimony, have become negligent of procuring and preserving other evidence. It must be very pernicious to this community, therefore, that this ancient privilege, and one so much relied upon, should be taken away at the choice of one party, who must be supposed to know his advantages, and that the other party should be obliged to defend himself, deprived of the accustomed mode of substantiating his charges and payments. It is, in short, no less than taking from parties that testimony to which, from long and perhaps universal usage, they think themselves entitled.

Besides, in our action of book debt, the defendant has the opportunity of setting off all his charges against those of the plaintiff, and, if they exceed the plaintiff's, of recovering his balance and costs.(a) This is certainly a very beneficial provision, both as it prevents litigation and expense, and as it is a security that one party shall not gain an undue advantage over the other. Such a provision ought not to be defeated; nor are the forms of action by which it is secured, to be rashly invaded.

(a) 1 *Stat. Conn.* tit. 25. c. 1. s. 3.



2. The declaration is too general. It ought to have stated, particularly, the labour done, and services performed, in order that the defendant may come prepared to repel the claim. Here it is not even hinted in what capacity or character the plaintiff acted, while performing these services, nor is the nature of the services at all mentioned. Our courts have decided, that *indebitatus assumpsit* shall not be supported by a general promise to pay the plaintiff all the defendant owed him. The promise must have a particular reference to the *very* debt sued for; and must not be capable of an application to other debts. The plaintiff does not offer to prove any promise to pay the particular *items*; but only a general acknowledgment of the debt. Indeed, if he did offer particular testimony, it could not be gone into on the general counts.

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3. The counts which declare upon the services performed for *Alcox*, and the moneys paid to him, are within the statute of frauds and perjuries, as the promise of the defendant is an engagement to pay the debt of another. It is admitted, that in one of these counts, the allegations are made with sufficient particularity.

*Duggett and Bristol*, for the plaintiff.

1. On the same principles that the oath of the party has not been allowed in this case, the action of book debt itself, being an anomaly in our law, ought not to be extended by construction; much less ought it to be so construed as to defeat the remedies afforded by the common law. The statute respecting book debts has not prohibited a resort to the common law remedy in all proper cases; and consequently all other modes of redress remain the same as they were before that statute. A statute giving a new remedy, does not take away a remedy furnished by the common law, unless it be expressly taken away; but, in all such cases, the statute and common

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law remedies are concurrent. Thus, it was never imagined that the statute giving threefold damages for cutting trees on another's land (a) had abolished the remedy by trespass at the common law. But the statute regulating book debts does not profess to give the form of action; it merely regulates the action by allowing the parties to testify, and enabling the defendant to recover if the balance is in his favour. It is probable the form of book debt had been adopted in practice long before the statute was made.

Nor are we to forget, that this action is in derogation of the common law, and a direct invasion of the established rules of evidence.

As to the objection, that the defendant is deprived of his oath, it may be answered, that the plaintiff is deprived of the same advantage, and it is as likely to be an inconvenience to him as to the other party; and as he pursues a common law remedy, he must establish his claim by common law proof.

This objection, in a more specious form, was originally made to all actions of *assumpsit*, where debt on simple contract might be brought at the common law. The reason then assigned was, that this action took away the defendant's wager of law, and thus bereaved him of the benefit which the law gave him. 4 *Co. Rep.* 92. Yet the court held, in *Slade's* case, that *assumpsit* was a proper remedy, though it deprived the defendant of his wager of law.

2. It was unnecessary to state, with more particularity, the services performed. If the plaintiff is able to show that any services, which could come under these allegations, have been performed by him for the defendant, *he*, on the

(a) 1 *Stat. Conn.* tit. 165. c. 1. s. 1.

other hand, must come prepared to show that these services have been paid for, or discharged, or that some good and legal reason exists why they should not be remunerated. If any thing further than this general averment is required, how particular must the plaintiff be? Must he show the days, hours and minutes, he has been employed? Or must he state the number of cases in which he was retained? the several terms which intervened, the consultations had, or arguments made? This would swell the record to an insupportable and endless prolixity. Neither precedent, nor authority, can be cited in support of the doctrine advanced. No cases in this state can be cited, where great particularity has been held to be necessary. It is the constant course of practice here, to make general averments as in the present case. In *England*, and by the supreme court of errors in this state, actions precisely like this have been held maintainable.

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It may be well to observe here, since the action of book debt is so zealously advocated by the counsel for the defendant, that no form of action used in our courts of justice is more general than that of book debt; nor is it possible to conceive of any form more general. It simply demands that the defendant render to the plaintiff such a sum, which he owes *by book*.

But lest any inconvenience should result to the defendant, or he should be taken by surprise, the court may order the plaintiff to furnish him seasonably with *oyer* of his account, which must be a more accurate specification of his demand than any declaration can be supposed to afford. This has been voluntarily done in the present case, for more than eighteen months.

3. The counts applicable to the services rendered, and the money paid to *Alcox*, allege, that they were performed at the special instance and request of the defendant, and we offer to prove that request, and the services per-

April, 1808. formed in consequence of it. The undertaking of *Nichols*, then, is an original undertaking to pay for those services, and not collateral to any contract or obligation of *Alcox*.  
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The counsel for the defendant, in reply, commented upon the words of the statute, "In all actions *on* book debts," which seemed to imply, that different actions might be brought for articles and services commonly charged on book. Since, however, this action has been decided by the court not to be an "action on book," by the exclusion of the defendant's oath, no evidence ought to be admitted to substantiate a book-debt claim.

To this it was answered, by the counsel for the plaintiff, that the words "actions *on* book debts," had been always understood to mean the same as "actions *of* book debts."

LIVINGSTON, J., after requesting to hear the statute read, observed: From the reading of the statute I am convinced that this action is well brought; and that *assumpsit* and the book-debt action are concurrent remedies.

As to the legality of permitting parties to testify in the action of *assumpsit*, on the ground that it is an action *on* book, I have doubts with respect to the correctness of my decision yesterday. I am far from certain that the party ought to be excluded; and I hope that no inconvenience will result to the defendant in this case from that decision.

I think the objection, that the declaration is too general, cannot prevail. In the *English* practice and our own, declarations as indefinite as this may be found; though it is usual to declare for services rendered as an attorney, physician, mechanic, &c. Very little particularity is demanded in *assumpsit*, except in the count for money had



and received, where more exactness and precision is required. This is open for discussion, however, in a future stage of the case.

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The evidence was admitted, and the jury found a verdict for the plaintiff for the amount of his account.

Upon a motion in arrest,

*Ingersoll* and *Staples* took two exceptions,

1. The declaration is too general. The same arguments were relied on to support this position that have been stated in the objection to the testimony.

2. It does not appear by the record that the plaintiff is a citizen of the state of *New-York*, or the defendant a citizen of the state of *Connecticut*. That this should appear is absolutely necessary; and this court has, without motion, ordered a case to be erased from the docket, on discovering that the parties did not appear to be citizens of different states.

*Daggett* and *Bristol*, contra.

The first exception comes too late after verdict, when every promise alleged in the declaration is taken to be an express promise, or even a promise in writing, if necessary to sustain the verdict.

But an allegation of work and labour generally, without setting out what sort of labour, or in what manner it was performed, is good, and agreeable to numerous precedents in the books of forms. Some doubt was formerly entertained on this point, but the question has been long since put at rest. *Carthew*, 276. 1 *Vent.* 44. *Sid.* 425. The best pleaders have latterly adopted

April, 1808. this mode, as the plaintiff would be restricted in his  
EDWARDS proof, if the declaration were more special.

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2. The plaintiff and defendant are well described as citizens of the states of *New-York* and *Connecticut*. The plaintiff is alleged to be a citizen of the district of *New-York*, and the defendant a citizen of the district of *Connecticut*. By the act of congress to establish the judicial courts of the *United States*, vol. 1. *U. S. Laws*, 48., the *United States* are divided into districts; and the states of *New-York* and *Connecticut* are respectively constituted districts of the same name. The same territorial limits, as well as the same body politic are, therefore, described by the terms district of *Connecticut*, as if the word state had been used. The district and state of *Connecticut* are synonymous and coextensive, and the parties are described as citizens of the states of *New-York* and *Connecticut*, by language perfectly definite and certain.

LIVINGSTON, J. overruled the motion in arrest, and ordered judgment to be entered.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF ERRORS,  
AND BEFORE THE  
NINE JUDGES OF THE SUPERIOR COURT  
OF  
THE STATE OF CONNECTICUT,  
AT HARTFORD, IN JUNE, 1808.

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*The present organization of the SUPREME COURT OF ERRORS, and of the SUPERIOR COURT of the State of Connecticut, was established, by an act of the Legislature, in May, 1806. [Stat. Conn. tit. XLII. c. 14.] It is summarily as follows:*

*The superior court consists of one chief judge, and eight assistant judges, who annually divide themselves into three branches; and the several counties in the state being divided into three circuits, one branch is assigned to each circuit. In all the counties, a circuit court is held twice, and in one county, three times a year. This court has civil, criminal, and chancery jurisdiction; and, in its several capacities, determines, by the aid of a jury, au-*



*ditors, referees, or commissioners, when necessary or proper, all issues in law and in fact.*

*The supreme court of errors consists of all the judges of the superior court; and holds one term in a year, at Hartford and New-Haven, alternately. In technical strictness, this court has cognisance only of writs of error from the superior court; but as all the individuals composing the former are judges of the latter, a convenient opportunity is afforded, while they are thus assembled, for hearing argument on motions for new trials, and cases stated. These, of course, occupy a considerable portion of the term. The opinions of the judges upon them are given by way of advice to that branch before which the cases are respectively pending; but this advice is always followed, and is considered as settling the law.*

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At a meeting of the judges of the superior court, May 26th, 1807, the following RULES OF PRACTICE were agreed to be adopted in the several circuits, viz.

1. The presiding judge, in charging the jury, shall state to them the several points of law which may arise, and declare to them the opinion of the court thereon.

2. Bills of exceptions shall not hereafter be admitted, but motions for new trials shall be admitted, in all cases, in their room, to be filed within forty-eight hours after verdict, and during the session of the court.
3. The several circuit courts shall hereafter, at their discretion, reserve such motions for new trials, as they think proper, for the opinion of the nine judges, either with, or without stay of execution.

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Rules adopted at this term.

1. In all cases of writs of error, the counsel for each party, before argument, shall furnish the court with a *brief*, containing a statement of the case, with the points and authorities intended to be relied on.
2. In all motions for new trials before the nine judges, the counsel for the party who makes the motion shall go forward in the argument.

1808.

SAMUEL PECK *against* DEODAT WOODBRIDGE.

A man cannot collaterally impeach, or call in question, a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence, while such decree remains in force.

## WRIT of error.

This was an action on the case for a fraud, practised by *Peck*, in obtaining a decree in chancery against *Woodbridge*.

The declaration stated, that *Woodbridge*, on the 1st of *January*, 1773, became vested with the title to a certain piece of land, subject to a right of redemption by *Noah Rust*, and *Elizabeth*, the wife of *Peck*, children, and only heirs of *Noah Rust*, deceased, by whom the land was originally mortgaged. In 1782, those heirs brought a bill for liberty to redeem the mortgaged premises; whereupon the court decreed, that upon their paying the mortgage debt within a certain limited time, *Woodbridge* should give them a quit-claim of his right and title; and in case of their neglect so to make payment, their equity of redemption should be foreclosed. The money was not paid, and *Woodbridge* continued in possession, and made valuable improvements, and erected buildings on the land. He, and those from whom he derived title, had been in possession from the year 1770.

In 1799, *Peck*, in the right of *Elizabeth*, his wife, with her and *Rust*, brought their bill in chancery to the superior court against *Woodbridge*, praying for liberty to redeem said land; and stated, as the principal ground of sustaining the application after such a lapse of time, that said *Elizabeth* was married to *Peck* during her minority, and ever since had been, and continued to be, his lawful wife. On a hearing before the court, in *September*, 1801, this allegation was by them found to be true, and



a redemption decreed. In compliance with this decree, *Woodbridge* had surrendered the premises.

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The declaration then averred that said allegation was false, and known by *Peck* to be so; and the finding of the court was made entirely upon mistaken evidence, which *Peck* had fraudulently imposed upon them.

The fraud was stated to have been practised in this manner. *Peck* had been informed by Mrs. *Evans*, an aged woman in the neighbourhood, that his wife was born within two or three days of the birth of her daughter *Jenny*, whose birth-day was recorded, with those of her other children, on a leaf in her bible. This record *Peck* surreptitiously, and without the knowledge of Mrs. *Evans*, altered from the 11th day of *July*, 1762, to 1764, and left the bible where he found it. He then produced her as a witness before the court, to testify as to the time of his wife's birth. She unsuspectingly swore, that Mrs. *Peck* was born the same month, and within a few days of the birth of her daughter *Jenny*; and that she had recorded that day, with the birth-days of her other children, on a leaf in her bible. She then showed to the court the record which had been altered as stated, as being the true one made by herself; and testified, that from such record she knew that Mrs. *Peck* was born within two or three days of the 11th day of *July*, 1764.

The declaration concluded by alleging special damages, occasioned by the fraudulent practices of *Peck*. The date of the writ was the 30th of *July*, 1805.

*Peck* pleaded in bar, that on the 21st of *August*, 1805, *Woodbridge* brought a bill in chancery, stating the same facts in substance as those alleged in this action, and praying that the decree passed in *September*, 1805,

June, 1808. might be set aside; which the court, in *September*,  
PECK 1806, accordingly decreed, at the same time enjoining  
v. *Peck* not to make any use of his quit-claim from *Wood-*  
WOOD- *bridge*, and ordering him to pay to *Woodbridge* his costs  
BRIDGE. in both the chancery suits.

There was then a demurrer and joinder.

The superior court adjudged the plea sufficient.

*Brace* and *E. Perkins*, for the plaintiff in error.

It is incumbent on the defendant in error to show, that such an action as this can be supported by *precedent* or *principle*. It will not be pretended that any *case* is to be found in the books, where a plaintiff has sustained an action at law, on the ground that the defendant had obtained a decree in chancery against him. Nor is there any *principle*, or *analogy*, which countenances such an action. A decree in chancery, while it remains in force, is not only conclusive with respect to the rights of the parties decided by it, but imports in itself conclusive evidence that it was rightly obtained. This position is supported by numerous authorities in the *English* books, and has been sanctioned by more than one solemn decision in this court. The case of *Bush v. Sheldon*, 1 *Day's Cas.* 170., compares with this. There evidence was admitted by the superior court to show that the decree of probate was obtained fraudulently. This court unanimously reversed the judgment, on the ground that the decree could not be impeached collaterally. This principle is founded in sound policy: on a different plan, there would be no end to litigation. Nor can any hardship result from it. If a decree has been obtained against a party wrongfully, let him bring forward his process to set it aside. The mode of redress is pointed out in our

books of practice. It is, indeed, the very one, which, in this case, has been resorted to. (a)

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Will it be said, that chancery can furnish but partial relief? We answer, that in every case where chancery has jurisdiction of the principal subject matter, it can furnish all the relief that the nature of the case requires. The *principal* necessarily brings before the court such things as are *incidental*. 3 *Bl. Comm.* 437. *Martin v. Martin*, 1 *Ves.* 211. *Brooks v. Reynolds*, 1 *Bro. C. C.* 183. *Hardcastle v. Chettel*, 4 *Bro. C. C.* 163. *Beardsly v. Halls*, 1 *Root*, 366.

Will it be said, that chancery cannot give *damages*? Chancery is, appropriately, the *forum* to consider and decide the question of damages. In an action at law on a bond, the court is to take up the case *as a court of chancery*, and settle the damages. In *England*, indeed, the chancellor does not assess the damages himself, but directs an issue to be tried of *quantum damnificatus*. Here, the courts assess the damages directly.

*Sloman v. Walter*, 1 *Bro. C. C.* 418., was cited as an instance where chancery assessed damages.

[REEVE, J. There, the court went on the ground of relieving against a penalty.]

The defendant in error has obtained all the redress to which he is entitled by his bill in chancery. He sought, in his bill, complete redress; it was competent to chancery to grant complete redress; he cannot be permitted now to say that he has not obtained it. Can he then sustain an action at law for *further* redress?

But suppose the powers of chancery incompetent, and that an action may be brought to recover damages; in

(a) *Mitf. Plead.* 94.



June, 1808. that case, no damages can be given for any thing subsequent to the date of the writ. *Brasfield v. Lee*, 1 *Ld. Raym.* 329. *Fetter v. Beal*, 1 *Ld. Raym.* 339. 692. *Baker v. Bache*, 2 *Ld. Raym.* 1382. In the present case, the court have assessed damages; but it does not appear, whether for matters before, or after, the action was brought.

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Further, if an action at law can be maintained, it must be for *consequential* damages. If so, this action is *firemature*. No cause of action existed at the commencement of this suit; as the bill in chancery had not then been brought.

But this action does not proceed on the idea of a defect in the power of the court of chancery; but expressly on the ground of obtaining a double satisfaction. It is brought as an original action, claiming damages for the whole injury.

The principle involved in the present case is very important. To permit two original suits for the same cause to be prosecuted and pending at once, is absurd; is opposed to the general policy of legal proceedings; would occasion endless vexation, and needless expense.

*Goodrich and Daggett*, for the defendant in error.

This is an action on the case for a deceit in procuring a decree in chancery. It is objected, that that decree may yet be set aside, and the party injured by it restored to his rights. But the existence of that decree is not the only injury. The party has been subjected to great expenses in making defence; in procuring counter testimony; in employing counsel; in the derangement of his business, &c. To set aside the decree merely, would afford but partial redress. Complete redress can be had

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only by the action which has been brought; the nature of which is, that it may be adapted to the circumstances and exigencies of the case. *Bush v. Sheldon* was an action of ejectment for the land. But suppose it had been an action on the case against *Isaac Sheldon* himself for the fraud; could it not have been supported? In *Stewart v. Warner* the action went to invalidate the decree. But suppose it had been against *Stewart*, the master, for fraud in obtaining the decree; would it not have been sustained? The object of our action is not to affect a title established by the decree; to recover money paid in obedience to the decree; nor to obtain any thing inconsistent with the validity of the decree.

Actions founded on the same principle as this have been brought, and sustained. *Phelps v. Griswold*, before the superior court in *Hartford* county, and *Hanford v. Pennoyer*, in *Fairfield* county,(a) are in point.

The bill in chancery which we have brought, is in the nature of an original bill; because it is a bill of right. In order to bring a bill of review, permission to bring such a bill must first be obtained of the chancellor. But this bill, which attacks the decree on the ground of fraud, may be brought like an original bill. On this bill, no damages are recoverable. All that the court can do is to place the parties in their former situation. The complainant asks only to be restored to all that he has lost by the decree. This kind of bill always supposes a former decree, and has reference to

(a) That was an action for fraudulently obtaining, before a justice of the peace, a judgment against the plaintiff, by false and corrupt testimony. In the superior court, a recovery was sustained, on the ground, that the case admitted of no other redress. The fraud did not appear on the record, so that a writ of error could be brought; and our statute does not authorize a new trial, in a case before a justice. *Ex relatione Hon. J. Trumbull. Vide 3 Johns. N. Y. Term Rep.* 160.

June, 1808. it. No extraneous matters can be drawn into the bill.  
PECK It is limited, by its nature, to its applicability to the  
v. former decree.  
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BY THE COURT, MITCHELL, Ch. J. REEVE, J. and  
EDMOND, J. dissenting.

It is a principle of the common law, that a man cannot *collaterally* impeach, or call in question, a judgment of a court of law, or decree in equity, to which he is a party. It can only be done *directly*, by writ of error, petition for a new trial, or bill in chancery.

In this case, the plaintiff complains that the defendant obtained a decree in his favour, against the plaintiff, which is still in force, by false and forged evidence. This *collaterally* impeaches such decree, by not only showing it to be wrongfully obtained, but to be wrong in itself: of course, such action cannot be sustained.

Judgment reversed.



1808.

EUNICE STANTON *against* EBENEZER WILLSON and BENJAMIN SMITH, Executors of the last will and testament of JOHN BIRD, deceased.

EUNICE STANTON, Administratrix on the estate of JOSHUA STANTON, jun. deceased, *against* EBENEZER WILLSON and BENJAMIN SMITH, Executors, &c.

MOTION for a new trial.

These were actions of book debt for education and support, furnished by the plaintiff, before her intermarriage with *Stanton*, and by him afterwards, to the children of *Bird*. As both the cases depend upon the same principles, and were argued together, it is not necessary further to distinguish them.

The account produced at the trial consisted of the following articles:

To cash paid Mr. Conklin for his wife's nursing	
<i>William</i> , an infant son of said <i>John Bird</i> , from June 1st,	
1797, to April 1st, 1798, 43 weeks and three days, at	
1 dollar, - - - - -	\$43 43
To paid for extra nursing in his sickness, -	5
To paid the doctor's bill for ditto, -	10
To clothing said <i>William</i> 10 months, -	20

Husband and wife were divorced by a decree of the legislature; alimony was allowed her, which was to be in lieu of all claims of dower; and she was constituted sole guardian of two of their infant children; held, that the father was liable for education and support of such children, furnished in the first place by her as guardian, and afterwards by a stranger, to whom she had been married.

Where an infant child escapes from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education furnished to such child by a stranger.

What articles are necessities, must depend upon the circumstances of the party for whom they are furnished; and when those circumstances are ascertained, the court will only instruct the jury as to the *classes* of articles which are to be considered as necessities.

Book debt will lie for necessities furnished to an infant, without a request from the party liable, or a promise to pay for them.

A wife may be a witness for her husband in an action of book debt, especially after his death, though the charges accrued in his life-time.

June, 1808.	To boarding, clothing and nursing said <i>William</i>	
STANTON	from <i>March</i> , 1798, to <i>September</i> , 1803, 6 1-2	
V.	years, - - - - -	\$429 00
WILLSON.	To schooling said <i>William</i> 2 1-2 years at 6 dol-	
	lars, - - - - -	15 00
	To nursing and clothing <i>William</i> and his sister	
	<i>Maria</i> , from <i>June</i> 1st, 1797, to <i>May</i> 15th, 1798,	
	49 weeks and 6 days, - - - - -	74 78
	To extra nursing and doctor's bill in her last	
	sickness, - - - - -	20 00
	To boarding and clothing said <i>William</i> from	
	<i>October</i> , 1803, to <i>February</i> , 1806, 117 weeks	
	and 1 day, at two dollars 50 cents, -	292 87
	To two and a half years' schooling said <i>William</i> ,	12 00
	To boarding <i>John Herman Bird</i> , son of said <i>John</i>	
	<i>Bird</i> , from <i>February</i> , 1805, to <i>February</i> , 1806,	
	48 weeks and 1 day, - - - - -	96 30
	To paid for classic books, and tuition at college	
	for the same, - - - - -	55 00
	To expense money furnished the same, -	20 00

In the course of the trial, it appeared, that the plaintiff was married to *Bird* in *October*, 1789, and continued to be his lawful wife, until *May*, 1797, when she was divorced by a decree of the general assembly. By that decree, she was constituted sole guardian of their youngest children, *William* and *Maria*, mentioned in the account, until they should respectively attain to the age of twenty-one years, which guardianship she accepted. *Bird* was ordered to pay her, within six months from the 1st of *June*, 1797, three thousand dollars, as her part and portion of his estate, and in lieu of all claims of dower. This sum was afterwards paid to her satisfaction; and she gave him a written discharge from all claims and demands which she had against him, by virtue of the decree. *William* and *Maria* lived with, and under the care of the plaintiff;

and their support and education charged in the account were furnished by her, until her intermarriage with *Stanton*, in *October*, 1803, and by him afterwards. Of *John Herman*, the elder son of *Bird* and the plaintiff, she was not appointed guardian. He continued with his father several years after the divorce, and then, as the plaintiff contended, and introduced some evidence to prove, eloped from him for fear of personal violence, and went to live with *Stanton*. After this, *Stanton* furnished him with the support, tuition, books and money charged in the account. It was agreed, that the whole of the charges accrued without any request from *Bird*, and that he had never made any express promise to pay them.

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The plaintiff offered herself as a witness in support of the charges. She was objected to, as incompetent to testify as to such as accrued after her intermarriage with *Stanton*, on the ground of her relation to him. this objection was overruled; and she was admitted.

On the merits, the defendants contended, that *Bird* was not liable to pay *Stanton* for any part of the account for supporting *William* and *Maria*, on the ground that *Stanton* was not their guardian; and that, if there was any liability, it accrued to *Stanton* and his wife jointly. But the court decided, and gave it in charge to the jury, that the sole guardianship of the mother was no objection to a recovery by *Stanton*, inasmuch as the debt accrued solely to him.

The defendants also contended, that the plaintiff could not recover for any part of the charges relating to *John Herman*; but the court decided, and gave it in charge to the jury, that if they found that he eloped from his father for fear of personal violence and abuse, and could not with safety live with him, the plaintiff



June, 1808. was entitled to recover such sum for his support and education as they should judge reasonable.

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The defendants further contended, that upon the facts stated, the action of *book debt* would not lie; but the court decided, and gave it in charge to the jury, that the action of book debt was the proper remedy.

The defendants further contended, that by force of the decree of the general assembly, and the discharge of the plaintiff, *Bird* was not bound by law to support the children; but the court decided, and gave it in charge to the jury, that he was solely liable for their support.

On the whole case, the court directed the jury to find for the plaintiff to recover of the defendants such part of the account as was just and reasonable, taking into their consideration the situation and circumstances of the respective parties.

The jury found for the plaintiff accordingly; and the defendants moved for a new trial, on the ground that the court mistook the law in admitting the testimony objected to, and in their charge to the jury.

*N. Smith and Beers*, in support of the motion.

I. One point contended for by the defendants in the superior court, and reserved for the opinion of this court, is, "*that by force of this decree, John Bird was not by law bound to support the two youngest minor children, viz. William and Maria, for whom the principal part of the support was furnished.*"

By the decree, recited in the record before us, the rights and powers of the father as guardian are taken away, and placed in the hands of the *mother*.



1st. We contend, in the first place, that the *duty to* June, 1808.  
support ceases, when all the rights and powers of the STANTON  
guardian by nature are taken away from him, and placed V.  
in the hands of a person who, before this, was WILLSON.  
equally bound to support with him.

By the law of *nature*, each of the parents is equally bound to support and educate their offspring. The general expression "*parent*," is always used by legal writers, when treating of this natural liability to support children; they do not restrict it to the *father*, or *mother*, alone. 1 *Bl. Com.* 447.

To be sure, *during the coverture*, by the laws of many countries, the husband and wife are deemed but one person in law. She having no separate rights, and he having the exclusive control and custody of all their property, she can rarely be seen, or known, on this subject of support; but the instant the coverture ceases, she again shows herself;—her liability again appears. and even *during the coverture*, if you can find her with separate property, she has been held bound to contribute. It has been decided in *Great Britain*, that where the wife has separate property, and it goes to the husband's use during the coverture, she may come in as a creditor against his estate to that amount. 2 *Atk.* 284.

So where *her* real estate is mortgaged for his debts, *his* estate shall redeem it after his death. But it has been decided, that her contributions of separate property to the *maintenance of the family*, do not render her a creditor to his estate. So in case of *natural born children*, as the father and mother of them have separate rights, and separate property from each other, they are, by the laws of most countries, equally bound to contribute for their support, where the father is ascertained and known. And in *all* cases where you can find the father and

June, 1803. mother standing in *this situation*, they are *equally* bound  
 STANTON to maintain their offspring. Thus stands the case when  
 v the guardianship remains in the ordinary hands.  
 WILLSON:

But the case before us, is one, where the father, by a legislative act, is totally prohibited the care, custody and guardianship of his children; not only *that*, but the mother is by this same act constituted and appointed the sole and exclusive guardian till the children attain the age of 21. The same act which has sealed his existence as a husband, has also closed his existence as a parent and natural guardian.

But let us suppose all that the gentlemen opposed to us can contend for; suppose that the father alone is *generally* bound to support after the coverture is determined by divorce. In these cases, he almost universally remains the guardian of his children. But in the case before the court, *he* has no control over them; *he* cannot direct in what manner they shall be supported; no economical mode of his devising or prescribing is to be regarded or followed. Another person, *now* a stranger to him in legal contemplation, is to manage affairs in her own way, expend what she deems proper, and he must silently submit, and pay bills as presented. Surely the laws of *Connecticut* will not teach us such a doctrine.

2d. On a fair construction of this decree, all obligation to support, ceases on the part of *John Bird*. By this decree, this woman is not only *divorced*, and *appointed guardian* to the children, but she has the large and unexampled sum of 3,000 dollars given her out of his estate.

The mere act of giving her this large sum of money, if there was nothing else in the case, furnishes strong presumptive evidence enough that it was the *intention* of the legislature to give it for the support of the *children*, as well as for the support of the *woman*.

It is *not* given to her merely for *life*, as in ordinary cases; but it is given to her *absolutely*, for ever. Nor is it to be set off to her out of his *lands*, or in any *articles of personal property*, but it is ordered to be paid in *cash*.

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Again: when the legislature had their hands in the pockets of *John Bird*, making provision for this unfortunate woman, can we, for a moment, suppose that they would have been so inattentive and negligent towards these novel sort of orphans, as to have made no provision for them? Did the legislature forget that they had, at that instant, decreed, that this woman should be the future guardian of these children;—should have the sole and exclusive custody and control of them? Could they reflect upon this a moment, without perceiving the necessity of making provision to enable her to discharge the duties thus imposed upon her, in a proper manner? Did they mean *she* should eat bread before them, and give them none?—No: they knew that they had thrown these children upon the hands of this woman; and hence it was, that they decreed this large sum of money to enable her to support *them*, as well as *herself*. Can we believe that they intended, that every time she furnished these children with a meal of victuals, or a garment, that she should pursue *John Bird* into a foreign state or country; there commence a suit against him; there collect her testimony at a much greater expense than she could ever recover; and thus go through a long course of litigation with him? And so on, repeating the same, from time to time, as often as supplies were furnished them? Never can we impute to a body of men, composed of the collected wisdom of the state, such an unreasonable and foolish intention as this.

Again: on the *face of the decree*, there is a declaration of the intention of the legislature. It is there de-



June, 1808. STANTON v. WILLSON. declared, in effect, that this 3,000 dollars shall be appropriated for the *nurture and education of the children*, as well as for the *support of the woman*. The decree is in these words, (viz.) “that the said *John Bird* shall, within 6 months from the 1st of *June*, 1799, pay to the said *Eunice* 3,000 dollars, as *her* part and portion of the estate of said *John*, AND in lieu of all claims of dower.”

This, then, is given to her for two purposes :

1st. For “*her* part and portion of the estate of said *John*,” and,

2d. “In lieu of all claims of dower.”

Under this last clause of the decree, it then becomes necessary to inquire what is meant by the term *dower*;—what it is ever given for;—what is the *object* of it.

Is dower given for the support of the *woman alone* ? By no means: it is given for something more; it is for the *nurture and education of the children*, as well as for *her support*. And because the legislature have anticipated it, and ordered it to be paid before the *natural* death of *John Bird*, the application of it is not to be changed to a different purpose than that which the law has fixed. It is to be applied to the same use as though he was naturally dead, and it was set out to her as her *third* part of his estate.

Whatever may be the idea affixed to the term dower in *common parlance*, the true legal signification, as defined by the ablest common law writers, “is that portion of the husband’s lands, which the wife has, after the husband’s decease, for the sustenance of herself, AND for the *nurture and education of her children*.” *Co. Litt.* 30. b. 2 *Bl. Com.* 129, 130. *Jacob’s Dictionary*, tit. “*Dower*.”



And this court will, at once, recognise it as a well settled rule, that where a technical term of the common law has acquired a fixed signification, and is used in an act of the legislature, such act is to receive the common law construction. 4 *Bac. Abr.* 647.

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If, then, *dower* is given for the *nurture and education* of children, as well as for the support of the wife; and *this* is given in *lieu* of *that*, (though the *arrival* of it has been *hastened* by the interposition of the legislature,) it must, of course, follow, that this 3,000 dollars was intended for *their* support, as well as for that of the *woman*. And if it is about to be contended, (as it has heretofore,) that the man must have been *dead*, in order that the idea of *dower* can apply to the case, it may be answered, that by this sovereign act of the legislature, this man, in contemplation of law, was as effectually dead to all intents and purposes as it respected her, as though he had died a *natural* death. By this decree, *she* ceased to have any *husband*; *he* ceased to have any *wife*. Nay, *more* was effected by this decree than by a natural death of the husband: by a *natural* death, the children are left guardianless; but here, the same act which terminated his existence as a husband and a guardian, appointed another person guardian to his children. Much less than this kills a man in *England*: there, by a kind of civil suicide, a man may close his own existence, without the aid of a legislative decree. Abjuring the realm, or becoming a monk, terminates a man's existence as completely, for all civil purposes, as if he had died a *natural* death.

3d. *John Bird* cannot be liable, where it appears that the advancements were made *without his consent or request, and against his will*. It is very evident, from the whole course of proceedings, as far as the record will discover it, that every step from the application for a

June, 1803. divorce, down to the death of *John Bird*, was against  
 STANTON *his will*: and it is stated in the record, that the advance-  
 v. ments, which constitute her account, were without any  
 WILLSON. promise or request from him.

It is a principle well settled in the country from whence we derive our ideas of jurisprudence, that if a wife elopes from her husband, (though not with an adulterer,) and supplies are furnished her *against his will*, no recovery can be had for them. 2 *Stra.* 875.

II. In the next place. *Can the plaintiff recover for any part of her account, which is for the support of John Herman Bird, who was not under her guardianship, but under that of his father?*

1st. Whatever might be her claim to a recovery for the *other parts* of her account, most clearly *no part* of *this class* of charges, can, on any principle, be supported.

It appears, that this child *eloped* from his father, and went to live with his *mother's husband*: and it is said, he had fears of personal violence. Whether these fears were well grounded or not, or whether, like all other boys, he did not deserve and expect correction at times, does not appear. But we apprehend, that the pretended, imaginary, or even *real*, fears of a boy, are to be no justification for his eloping. Much less are they sufficient to authorize any stranger (for such was *Joshua Stanton*) to harbour, provide for, and educate him, at the expense of the father. Otherwise, a father would be placed in a perilous situation;—he would never dare to exercise his parental authority, if upon every look of disapprobation, the child might run away to some stranger, pretend that “*he was afraid of personal violence*,” and thus authorize the stranger to receive him, and charge the father. It would be constituting a child the

sole judge of the propriety of his father's actions and conduct. It would totally prevent the father from training up his child in the way he should go.

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2d. If any part of these charges are recoverable, that part of them particularly which consists of moneys expended for "*books, tuition and spending money at college,*" to the amount of 75 dollars, cannot be recovered.

There is no common or statute law, in *Great Britain*, or the state of *Connecticut*, compelling a man of property to educate his children, and particularly at college. They are left by the laws, at their own option, whether they will breed up their children to be ornaments, or disgraces to their family. 1 *Bl. Com.* 450. 2 *Swift's System*, 205. In *England*, they have certain statutes for the apprenticing of poor children; but no law (says Judge BLACKSTONE) compelling rich men to educate their children. So in *Connecticut*, the law has left it to the consciences of parents; and has only made provision for a sufficient degree of learning to prevent their sinking into barbarity; and that is, by requiring that children learn to read the *English* tongue well, and to know the laws against capital offences. Undoubtedly, this young man had received this learning from his father, or we should not have found him in a college immediately after eloping. In *Vermont*, where this education was bestowed, they have no statute at all on this subject. Whatever, then, is the common law of *England*, is the law of that state, since their statute adopting the common law. That common law, we have seen, makes no provision on the subject.(a)

III. Another question reserved for the opinion of this court is this: *Will the action of book debt lie?*

(a) See *Chipman's Rep.* 111



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We contend, that it will *not*. We apprehend, that this action will never lie, where the liability arises by mere operation of law.

This is a case of money laid out and expended, by a stranger to *John Bird*, for the support and education of his children, contrary to his mind and will. No agreement, or request, on his part is pretended. If the action of book debt will lie for this kind of implied agreement, no reason can be shown why it will not lie on every possible kind of implied agreement. If it will lie in the present instance, you may charge on book money paid under a *mistake*, or money paid *through the deceit of another*, and recover it back in this form of action. So money paid on a *consideration which happens to fail*; money obtained under a *void authority*; by *extortion, imposition, oppression*; or money paid on a note and *not applied*, might all with equal propriety be charged on book, and recovered back in this action. But it having been so recently settled by this court, in the case of *Bradley v. Goodyear*, 1 *Day's Cas.* 104. that money paid on a note, and not applied, could not be charged on book, that it will not now be contended for.

We contend further, that *if John Bird was liable to support these children, the plaintiff ought to have preferred her petition to a county court, in conformity to the statute law of this state, (a) or of the state of Vermont, where the support was furnished.*

The law of nature which applies to this subject, has merely compelled certain relations to support each other, but has not pointed out the *mode* in which they shall be compelled to do it. Hence we find that in *Great Britain*, in *Connecticut* and in *Vermont*, (where this support was furnished,) the legislature have passed acts declaring

(a) Tit. 88. c. 1.

what that law of nature is, and pointing out a *mode* in which this law shall be enforced.(a)

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In *Connecticut* and *Vermont* the acts are literal copies of each other in this respect; and the *manner* in which this obligation is to be performed is thus pointed out. The county court of the county where the relieved person dwells, on application by any relation, shall assess what shall be just and reasonable, and the sufficient liable relations shall pay in such manner and proportion as the court shall adjudge; and that whether such relations live in that county or not. This assessment *liquidates* the account. And it is also highly *proper* that it should be done there. The judges, who are to determine on the reasonableness of the account, live in the neighbourhood where it is furnished, and are therefore more competent to judge what is reasonable *there* than a court in the State of *Connecticut* or *New-York*. A sum which might be reasonable in one of these states might not be adjudged so in another.

But it has been said, and perhaps will be again, that these statutes do not extend to *infants* who are supported; but merely extend to persons who have *once* supported themselves and have *become* poor; of course can reach none but *adults*.

A few words from Judge *Blackstone's Commentaries* will set this point at rest. In the 1st vol. p. 449., he observes, that "no person is bound to provide a maintenance for his issue, unless where the children are impotent, either through *infancy*, disease or accident."

These are comments on the *English* statute of 43 of *Eliz.*; but it will be found, on comparing *our* statute with

(a) *Vide Kirby*, 156.

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theirs, that in this respect, they are expressed in similar terms.

IV. Another point is this. We contended in the court below (and it was overruled) *that this plaintiff ought not to be admitted to testify, to prove her account, because when the account accrued she was the lawful wife of Joshua Stanton, jun.*

It is not on the ground of an *interest* which she may have, that we object to the admission of this plaintiff, for in the action of book debt, *interest* is no objection to the admissibility of a witness; for the parties *themselves* are invariably admitted, and no persons can be more interested than they are. (a) But it is on the ground of *policy* that we object. If she can be admitted a witness *for* him, then she may *against* him. If she is introduced *by* him to testify in his favour, and on cross examination she discloses the whole truth, and it proves *against* him, it will create the most implacable quarrels and dissensions between them, and break in and totally destroy all the happiness of the married state. If she can be introduced by *him*, she may by *others*, and thus all the secrets of the family might be drawn out. And it makes no difference that she is not, at the *time of testifying*, his wife: it is enough to exclude her, that she came by this knowledge at a time when she was his wife.

In *Great Britain*, the exact point which we are contending for, has been judicially decided, in a very recent case, reported in the *Appendix to Peake's Evidence*, p. 44. *Monroe v. Twisleton*. This is also laid down by Mr. *Peake* as the settled law, in p. 174. of the body of his treatise; though he himself was opposed to the decision at the time it was made.

(a) *Vide stat. Conn. tit. 25. c. 1.*



*Daggett and Gould, contra.*

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I. The first question is, whether *Bird* was liable for the support of *William* and *Maria*?

The duty of the father to provide for the maintenance of his infant children is a principle of natural law, recognised and established by the common law. 1 *Bl. Comm.* 446. 448, 449.; 1 *Swift's Syst.* 204. In this case, support was furnished to such children; the articles furnished were necessary and proper; and they were furnished by a person appointed by law to do it in his stead. His liability, therefore, results conclusively, unless there are peculiar circumstances attending the case, which exonerate him. If he is exonerated at all, it must be by virtue of the decree of the general assembly. By that decree, *Bird* and the plaintiff were divorced *à vinculo matrimonii*; she was appointed the guardian of these children; and was allowed a reasonable sum as alimony from his estate.

Does the *divorce* discharge his liability? There can be no pretence of it. He is still the father of his children. The relation between them is not impaired, nor affected. Their respective rights and duties remain the same. It would be strange, indeed, if a *natural* duty from *A.* to *B.* should be discharged, by dissolving a civil relation between *A.* and *C.*

Does the *appointment of the mother as guardian* discharge his liability? As to this question, it makes no difference whether the guardian be the mother, or any other person. A guardian, as such, is not bound to support. He is the mere agent, trustee, and committee of the person and estate of his ward. 1 *Bl. Com.* 460.



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In chancery, a guardian will be allowed to apply the property of the infant for his support. *Com. Dig. tit. Chancery, 3 O. 2.* And in this state, he may charge the articles furnished on book, and recover for them, in an action at law. *Mills v. St. John, 2 Root, 188.* But it is otherwise with regard to a *father*. He will not be allowed, even in chancery, to apply the property of his child to his support, except where the father is in distressed circumstances. *Darley v. Darley, 3 Atk. 399. Hughes v. Hughes, 1 Bro. Chan. Cas. 387. Roach v. Garvan, 1 Ves. 160. Com. Dig. tit. Chancery, 3 O. 1.*

The duty of the father to support his child arises from the relation between them. That relation subsists, notwithstanding the appointment of another person as guardian.

Does the *allowance of alimony* discharge his liability? Why should it? Because, it is said, it will be *presumed* to be for the support of children. But whence arises such a presumption? Is alimony never allowed where there are no children? or where, by the terms of the decree, they are to remain with the father? Suppose, in this case, the children had *died* immediately after the plaintiff had received her alimony; could she be compelled to refund it?

II. The next question is, whether *Bird* was liable for the advances made to *Herman*?

There is no pretence, but that *Bird* was bound to support this child, in some way or other. The objection proceeds on the ground, that the supplies furnished were not *necessaries*; and that the persons furnishing them had no right to furnish them, and charge them to him.

As to the first part of this objection, it is a sufficient answer, that in determining *what are necessaries* the situation and circumstances of the parties are to be considered; and the direction of the court to the jury was, *to allow such part of the account as was just and reasonable, taking into consideration the situation and circumstances of the parties.*

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As to the other part, we contend, that if the father turns away his child; or, by cruelty, drives him away; or permits him to be away; he sends a *credit* with him; any one may relieve him on the father's account, especially a near connection.

If a husband turns his wife out of doors, he thereby gives "*a tacit assent*" to her contracts for necessaries; or, in other words, he sends with her credit for her reasonable expenses. 1 *Pow. Contr.* 139. *Rawlyns v. Vandyke*, 3 *Esp. Rep.* 251. where the husband of the mother of an infant child had taken the child into his family, and had then left him, it was ruled, that he was liable for necessaries furnished to the child on her contracts. *Stone v. Carr*, 3 *Esp. Rep.* 1. In *Rawlyns v. Vandyke*, just cited, Lord Eldon held, that where the father and mother are separated, and the husband suffers the children to remain with their mother, he thereby constitutes her his agent, and authorizes her to contract for necessaries for them. In the principal case, *Bird* did something more than merely to leave his son *Herman* without making provision for his support; and something more than to suffer him to go and remain with his mother. *Hodges v. Hodges*, 1 *Esp. Rep.* 441. is perhaps still more strongly in point. In that case, Lord Kenyon ruled, that where a wife's situation in her husband's house was rendered unsafe from his cruelty, or ill treatment, it was equivalent to turning her out of doors, and he would be liable for necessaries furnished

June, 1808. to her under those circumstances. It is impossible to distinguish the case cited from the principal case as relative to *Herman*, except upon a supposition equally absurd and illegal, that a father is under less obligation to support his child than a husband is to support his wife.

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III. The counsel for the defendants contend, that we have misconceived our action. They insist, that we should either have brought *indebitatus assumpsit*, or made an application to the county court under the statute.

The reason offered for bringing *assumpsit* is, that the liability arises by mere operation of law. But *book debt* also will lie in many cases, where the promise is an implied one. Indeed, the principal use of this action is to support a recovery in such cases. It is very seldom that it is brought where there is an express promise to pay; for a party will not be allowed to prove such a promise by his own oath. Guardians, conservators, &c. always make their charges on book; and are allowed to support them by their own oaths, and to recover for them in this action. *Mills v. St. John*, 2 Root, 188.

Again: If *A.* is *obliged* to pay the debt of *B.*, we admit that book debt lies not, but *indebitatus assumpsit*. There, as between *A.* and the creditor, *A.* pays his own debt; it is money paid to the use of *B.*, not to *him*. But it is otherwise, where *A.* advances necessaries to any one, on account of *B.* who is bound by law to procure them; for instance, to the wife of *B.* There, in contemplation of law, the necessaries are advanced to *B.*

The other ground of objection to our action is equally untenable. Before that objection can prevail, it must be shown, not only that this case is within the statute, but that the statute furnishes the only remedy. But we contend, first, that the statute does not relate to *infant*



children; at any rate, it *creates* the duty only to adult children; as to infants, it is only in aid of the common law. It certainly does *create* the duty as to *them*; for the obligation to support infant children is a common law duty, enforced by action of common law. 1 *Bl. Comm.* 446, 448, 449. 1 *Swift's Syst.* 204. *T. Raym.* 500. In *Simpson v. Robertson*, 1 *Esp. Rep.* 17. *Ford v. Fothergill*, 1 *Esp. Rep.* 211. and *Stone v. Carr*, 3 *Esp.* 1. the action was at common law; but the *English* statute of 43 *Eliz. c. 2.* is substantially like ours.

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Secondly, the statute extends to those cases only, in which application for *future* support is made by *select-men*, or some stranger *related* to the pauper; not where *the guardian has furnished* support. See *sect. 2.*

IV. Another ground, on which a new trial in this case is moved for, is, that the plaintiff was admitted as a witness.

It is not claimed, that she was incompetent, by reason of *interest*; for the statute expressly admits those who have the greatest interest.<sup>(a)</sup> But the ground relied upon is, that to admit a wife to testify in a case in which her husband is interested is opposed to sound policy, as it would disturb family peace. We admit, that the wife can neither be compelled, nor allowed to testify *against* her husband. But in this case, let it be observed, that the plaintiff had no husband when she testified; and that her testimony was not against the interest of him whom she represented, but in favour of it.

*By the Court.* SMITH and BALDWIN, Judges, dissenting, SWIFT, J. absent. Parents are bound by law to maintain, protect, and educate their legitimate children, during their infancy, or nonage. This duty rests on the father;

(a) *Stat. Com.* tit. 25. c. 1.

June, 1808. and it is reasonable it should be so, as the personal  
STANTON estate of the wife, and in her possession at the time of  
v. the marriage, becomes the property of the husband, and  
WILLSON. instantly vests in him.

By the divorce, the relation of husband and wife was destroyed; but not the relation between *Bird* and his children. His duty and liability, as to them, remained the same, except so far forth as he was incapacitated, or discharged, by the terms of the decree. This decree takes from him the guardianship of two of his children; and with it the right, which, as natural guardian, he might otherwise have exercised; and releases him from those duties only which a guardian, as such, is bound to perform. This transfer of the guardianship to the plaintiff vested her with powers similar to those of guardians, in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subjected by a like appointment. By accepting the trust, she became bound to provide for, protect, and educate them, at the expense of *Bird*, unless the decree of the general assembly has made other adequate provision, which, by the terms of that decree, she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her *as her part and portion of Bird's estate, and in lieu of all claims of dower.*

Articles furnished by a guardian for the necessary support, maintenance and education of his ward, or by others at his request, are proper articles to be charged on book. *Book debt* is the proper action; and the party is, by statute, in this action, made a competent witness.

What articles are to be considered as *necessaries* must depend, in some measure, on the circumstances of the

party for whom they are furnished. The court can only June, 1808.  
 instruct the jury as to the *classes of articles*, which, by STANTON  
 law, are considered as necessities; but the *quantity*, or V.  
*extent* to which they have been furnished is a fact to WILLSON,  
 be left to the jury; and to what amount they shall be  
 allowed must depend on their discretion.

It may be generally true, that minors under the government of parents cannot bind their parents for necessities without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes a sufficient reason for the rule; but neither the rule, nor the reasoning, will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself, or at her request; who, in virtue of her trust, had full power to contract, and make the father liable for necessities, not only *without* but *against* his consent.

With respect to the charges on account of *Herman's* support, if it is admitted, that "he eloped from his father for fear of personal violence and abuse, and could not with safety live with him," every reason for the rule that can be given, ceased to operate. Protection and obedience are relative duties; and when the wisdom that should guide the infant is lost in delirium, and the arm that should protect, and the hand that should feed him, is lifted for his destruction; obedience is no longer a duty, and the child cannot with any propriety be said to be under the government of a father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety



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where it can be found; and where, with more propriety can it apply, than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say, it was furnished without his consent, or against his will.

Motion denied.

JESSE BROWN *against* HARTFORD INSURANCE COMPANY.

In a policy of insurance, the clause "*prior in date*" referring to other policies upon the same risk, is equivalent with *prior in time*.

WRIT of error.

This was an action of *assumpsit*, upon a policy of insurance, upon goods on board the brigantine *Ontario*, from *Martinico* to *New-York*, or *New-London*; against dangers of the sea, &c.

The plaintiff stated his interest—a loss by tempest—an abandonment, and a demand.

The defendants pleaded, that it was provided in their policy, that "if the assured had made any other assurance upon the premises, *prior in date* to this policy, then the said assurers shall be answerable only for so much, as the amount of such prior assurance may be deficient, towards fully covering the premises hereby assured; and that the *Hartford Insurance Company* shall return the premium upon so much of the sum by them assured, as they shall be, by such prior assurance, exonerated from; and that in case of any assurance upon the said premises *subsequent in date* to this policy, the said *Hartford Insurance Company* shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without

right to claim contribution from such subsequent assurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent assurance had been made:" and then averred that the plaintiff, prior to the assurance made by the defendants, had procured insurance upon said goods to the amount of 20,000 dollars, (viz.) 15,000 dollars at *Boston*, on the 1st of *February*, 1805, and 5,000 dollars at *Middletown*, by the *Middletown Insurance Company*, by a policy dated the 7th day of *March*, 1805; (which policy contained a clause similar to that above recited in the policy made by the defendants;) which assurances were both made *before* and were *prior to the date* of the policy made by the defendants, (viz.) the one at *Boston*, on the 1st of *February*, 1805; the other at *Middletown*, on the 7th day of *March*, 1805, between the hours of nine and eleven in the forenoon; and that the assurance made by the defendants was made *afterwards*, on the said 7th day of *March*, 1805, between the hours of seven and eight in the afternoon of said day: that the insurable interest of the plaintiff in said cargo amounted to the sum of 22,050 dollars and 86 cents, and no more; and the defendants had paid to the plaintiff the sum of 2,050 dollars and 86 cents, the amount of his interest beyond the sums insured by the former policies.

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To this plea there was a demurrer; and it was adjudged sufficient, by the superior court; upon which judgment this writ of error was brought.

*Dana and Hosmer*, for the plaintiff.

The sole question is, whether the policy made at *Middletown*, the same day with that at *Hartford*, though before, is *prior in date* to the latter. Do those words mean before the moment, or act, of underwriting the policy; or do they mean, before the date, *expressed or apparent* on the face of the policy?

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The word "*date*" has sometimes been taken to mean the act or minute of delivery ;(a) but this is contrary to the usual acceptation, in consequence of other words, showing the intent, *ut res magis valeat, quam pereat*. But when the word "*date*" is not limited, or qualified, by something extrinsic, it always denotes the date expressed. Thus, when we speak of the date of a letter, a note, or a declaration, we always mean the date therein expressed. So *the date* is said to be the day, month and year ;(b) and bearing date is of the same import.(c)

We are not, then, to look to the etymology of the word for its construction ; for from the *arbitrary* use and fluctuation of language, the popular meaning of words differs much from that of the root from whence they are derived.(d)

*Usus est jus, et norma loquendi*:(e) usage decides upon the force of language.

Deeds take effect not from their *date*, but from delivery.(f) Date and delivery are here used, not as synonymous, but in opposition to each other.

From *henceforth* means from the *making* or delivery. *Clayton's case*.(g) The statute of 27 Hen. VIII. concerning enrolments, expressed, that they must be made within six months after *the date* ; if such writing have a date, the six months shall be computed, not from *the delivery*, but from *the date*.

(a) *Hatter v. Ash*, 3 Lev. 438. *Gilb. Law Ev.* 210. 456.

(b) 1 *Marsh. Ins.* 241. (c) *Co. Litt.* 6. (d) 1 *Pow. on Cont.* 373.

(e) 1 *Bl. Comm.* 359. *Cowp.* 704. (f) *Shep. Prec.* 69.

(g) 5 *Co.* 1.



In an *anonymous case*, (a) *Holt*, Ch. J. says, a date of a deed is *express*, or *implied*; the express date is the very day, and year, in which the deed was made; and this is always intended, when it is said, *bearing date*; the other is the implied date, which is the *delivery*.

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In *Goddard's case*, (b) it is said, "The date of a deed is not of the substance of a deed; for if it hath no date, or a false or impossible date, yet the deed is good. For there are but three things of the essence and substance of a deed; that is to say, writing, in paper or parchment; sealing; and *delivering*. And when a deed is delivered, it takes effect by the *delivery*, and not from the *date*." Here again, Lord *Coke* distinguishes the *date* from the *delivery*. "I. S. makes an obligation dated and delivered the 1st of *May*: on the 1st of *June* the obligee made a release bearing date 1st of *March*, but delivered the 1st of *June*, releasing all actions, *ab origine mundi*, until the date of the release. And all the justices were of opinion, that the obligation was not released." *Drury's case*. (c) Here, the date is settled to mean the expressed date.

In *Pugh v. Leeds*, (d) Lord *Mansfield* says, what is the date? It is a memorandum of the day when the deed was delivered. In *Latin*, it is *datum*; and *datum tali die*, is delivered on such a day.

Then in point of law, there is no fraction of a day; it is an indivisible point. What is the day of the date. It is the day the deed is delivered. The *date*, therefore, and the *day of the date*, must be the same thing. It is impossible, in common sense, to distinguish the one from the other. Date does not mean the *hour* or the *minute*, but the *day of delivery*, and in law there is no fraction of a day.

(a) 3 *Salk.* 120. (b) 2 *Co.* 5. (c) *Cro. Eliz.* 14. (d) *Cowp.* 704.

June, 1808. As to the other point, that *from* should, in all cases, be construed to be exclusive, it is contrary to the common signification of language. And for courts of justice to determine words against the intention of parties, and against the generally received sense and acceptance of the words themselves, is laying a snare to entrap mankind.

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The multiplied contradictory determinations upon the words "*from the date*" would never have existed, had *date* been supposed to mean delivery; and the reason why *date* means the *expressed date*, is because it is not necessary, in one instance out of a hundred, to distinguish the moment of delivery, but the day only.

The construction contended for, by the plaintiff, is the most *equitable*, as it divides the loss equally among the insurers.(a)

It is not to be supposed, that the speaker will hurt himself; and if his words are construed in the sense which is strongest against him, it makes it for his interest to avoid intricate and ambiguous expressions.(b)

But if the *reason* on which the stipulation is founded is brought in to aid the construction, we ought to be certain that the true reason is known; and not be led to adopt vague and uncertain conjectures.(c) If the words are *clear*, and present nothing absurd, they must have a controlling influence, without reference to the reason or *motive* inducing the contract.(d) So the preamble to a statute may be called in to *explain*, but cannot control the enacting clause, expressed in clear, and unambiguous terms.(e)

What was the *reason* of this stipulation? The defend-

(a) *Marsh. Ins.* 115. (b) *Gilb. Law Ev.* 213. 1 *Pow. on Cont.* 395.

(c) *Vattel*, 385. (d) *Vattel*, 386. (e) 4 *Term Rep.* 793.

ants were unwilling to assume risks already covered; and therefore, on principles of *convenience* and security, and to prevent litigation and expense, and the perils of oral testimony, they assumed the *express date* of policies as the standard by which their responsibility was to be tested. This is our *conjecture*; the *reason* is not, and cannot be certainly known.

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But had not the parties intended to have avoided this confusion, they would have used the word "*prior*" instead of the words "*prior in date*." As they have not, there is reason to suppose that they thought, with Lord Coke,<sup>(a)</sup> that fractions in a day would be "*the mother of confusion and contention*."

The plaintiff does not contend, that a wagering policy would be good. But the case of double insurance is like that of sureties: the party has a double security, but founded upon one interest.

*Goodrich* and *T. S. Williams*, for the defendants.

What did the parties intend by this clause in the policy? And is their intent to be pursued?

To determine what the parties intended, it is necessary to inquire what would have been their situation without this clause by the *English* law, from which we have borrowed ours. By that law, as at present understood, where there are insurers to more than the amount of the interest, the insured may collect the sum insured of the last underwriter, or the first, at his election; and the person from whom he collects it may resort to the other underwriters, and compel them to contribute according to the sums by them insured.

(a) 5 Co. 1.



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The evils from this mode are various. It gives the assured a right to alter the situation of the assurer without his consent, by a subsequent insurance. It makes the underwriters insure the solvency of each other. It makes those who write on the same policy partners with each other. It compels them, as the case may be, to resort to foreign jurisdictions to procure contribution from those with whom the insured may have chosen to contract. But above all, it holds out a temptation, and affords a shelter for fraud. *Miller on Ins.* 265.

To prevent these evils, the underwriters in this country have generally inserted a clause in their policies similar to the one under consideration, by which they intended to avoid these inconveniences, and to cut up by the roots this doctrine of contribution. And the question between us is, may not the words used be so construed as to give effect to this intent?

The words used are "*prior in date.*" Had they used the word "*prior*" only, it is agreed, that there would have been no doubt as to the construction. Did they intend to limit it, by introducing the word "*date.*" What is the *date*? *Johnson*, in his *Dictionary*, gives as one definition "*the time at which an event happened.*" It is said to be the very *act* of *delivery* of a deed, and is from *datus*. 3 *Lev.* 439. So, Lord *Coke* says, it means the *time* of execution or delivery, and takes effect from that time. 2 *Co.* 5. It is not of the substance of a deed. *Yelv.* 193. And when it is mistaken, the plaintiff may prove the time of actual delivery. 3 *Lev.* 348. *Cro. Eliz.* 390.

Lord *Mansfield*, indeed, says, that *date* means the *day*, not the *hour* or *minute* of delivery; and there is no fraction of a day. *Cowp.* 720. But these words are to be taken as relative to the case before him; and as only

a general rule:—Because the same judge always held, that fictions were not to be urged, contrary to the justice of the case. 3 Burr. 1243. 3 Wils. 274. And in *Combe v. Pitt*, 3 Burr. 1434. he says, not only the *day* but the *time of day* may be averred to show which is prior; “for the day is not like a mathematical point, which cannot be divided.” So long as there are hours and minutes, different transactions will be done at different hours of the same day. And there are many cases where an inquiry is made as to the time of day when an act is done, as where there is a claim of the attaching creditor, or one creditor claiming by a *deed*, and one by an attachment of the same date. So, where there is an execution, and commission of bankruptcy, on the same day; an inquiry may be had as to the priority of either. 8 Ves. jun. 82. So an action for words will lie upon the very day on which they were spoken. *Styles*, 72. So when a note and a release are executed on the *same day*, the party may aver which was first. *Co. Litt.* 46 *Pow. on Powers*, 532. And *Drury’s case* is nothing more than this. *Cro. Eliz.* 14. When there are two bottomry bonds, the one of the *last date* is to be preferred. *Abbott*, 112. But if there were two of the same date, is there any doubt but the last would be preferred, though the date was the same. *Caines*, the only writer who speaks of this clause in our policies, treats these words “*prior in date*,” as synonymous to the word *previous*. *Lex Merc. Amer.* 817.

The term *date* means no more the apparent date than the real date. The true meaning is, when the thing was done. If by “*prior in date*” was meant only the apparent date, then the clause introduced with so much care into all our policies would be of no avail; because the assured need only procure a policy dated so as to meet his own risks, and its effect is destroyed. The real date must, therefore, in this case, as in all

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But aside from the words made use of, in this clause of the policy, it is worthy of consideration whether the defendant would be liable. The plaintiff having covered his interest is sure of an *indemnity*. Any attempt to do more is in nature of a *wagering* policy, and therefore void by our statute concerning gaming, and by the general principles of common law.

The construction *at present* given to such insurances in *England*, must be founded upon their own customs, and is certainly contrary to every analogous case. It is contrary to the ordinances of almost every commercial nation, viz. to those of *Antwerp, Genoa, Spain, France, Bilbao, Florence, Amsterdam, Hamburgh and Stockholm*. 2 *Mag.* 27. 65. 34. 172. 412. 134. 222. 267, 268. Indeed, that writer says, it is the *universal* custom, that the first insurance stands good, and the last returns the premium. 1 *Mag.* 90. *Park*, 288. So was the former custom in *Great Britain*, as proved by *all the exchange*. 1 *Show.* 132. And this *Malynes* calls the *rare custom* of insurance. *Mill.* 266. This is, indeed, changed by modern decisions. *Marsh.* 117. But our courts, it is believed, will hesitate, before they recognise those decisions in this state; and will adopt the maxim, that *via antiqua via est tuta*.

*By the Court*, GRISWOLD, J. not sitting.

The only question presented by this record arises from the phrase "*prior in daté*." The day of the date of both policies being the same, it is contended that, as the law does not notice the fractions of a day, it is incompetent for the defendants to aver, or prove, the *hour* of execution, to show priority of time.



It is true, generally, that the law disregards the fractions of a day, because generally it is not important; but the rule is not universal. It is clearly otherwise, where the precise time is important for the attainment of justice. Contests of this kind frequently occur between attaching creditors under our statute, and between opposing claimants under record titles. In these, and many similar cases, priority of time in the same day is always an issuable fact.

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It was evidently the intention of the contracting parties in these policies, to avoid the inconvenience of contribution, by making the insurers liable in the order of time. This was anciently the law in *England*; modern practice there had introduced a different rule. The parties intended, by inserting the clause in question, to abolish the modern, and restore the ancient, rule. This being their object, it is unreasonable to suppose that the parties, while thus attempting to alter the rule, should leave a portion of time, viz. a day, subject to the inconvenience of a rule they evidently intended to avoid. The fair inference is, that they altered the rule, not only generally, but universally; and that their expressions, if not explicit, are to receive such construction as will effect the apparent object of the contracting parties.

We are, therefore, of opinion, that the expression "*prior in date*," as used in these policies, is equivalent with *prior in time*; and that it was, of course, competent for the defendants to aver and prove the precise time of execution; and that there is nothing erroneous in the record before us.

Judgment affirmed

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SAMUEL CULVER *against* JOHN ROBINSON.

Usury may be given in evidence under the general issue.

In such case the defendant must give the plaintiff notice of the defence.

WRIT of error.

This was an action brought by *Robinson* against *Culver* on a promissory note. The plaintiff declared, according to the usual form in this state, "That the defendant in and by a certain writing or note, under his hand, by him well executed, dated the 22d day of *April*, 1807, promised the plaintiff to pay to him, for value received, the sum of 56 dollars, in six months from the date of said note," making a profert of the note, and negating the performance of the promise therein contained.

The defendant pleaded *non assumpsit*; on which issue was joined.

Under this issue, the defendant, on the trial, offered to prove that the note was usurious. This was objected to, on the ground that it should have been pleaded; and the court ruled, that it could not be received. The defendant filed a bill of exceptions, on which the cause was brought before this court.

*Staples*, for the plaintiff in error.

On two grounds this evidence ought to have been admitted.

1. Upon the principles of the common law.

2. Upon the statute of this state regulating *pleas and pleadings*.(a)

(a) Stat. Conn. tit. 192.

1. By the principles of the common law, this evidence ought to have been received. June, 1808.

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It is admitted, that in *England* usury cannot be given in evidence under the plea of *non est factum* to a bond. The reason assigned is, that it is a *specialty*; 2 *Selwyn's N. P.* 490, 491, 492. *Fortesc.* 336. 1 *Str.* 498. *S. C.* *Esp. Dig.* 223. and that whatever goes to avoid a specialty, not appearing upon the face of it, must be pleaded. Though this is admitted to be the practice in *England*, it is contended that it is not founded in principle. The plea of *non est factum* to a bond means, that the man did not, in point of law, as well as in point of fact, execute the bond. It is a settled principle, that coverture may be given in evidence under the plea of *non est factum*; and the reason assigned shows that usury ought to be admitted under the same plea, to wit, that the bond is absolutely void, and not voidable. By statute, every bond, the consideration of which is usurious, is not only voidable, but utterly void; and no subsequent agreement or ratification can set it up.

But even in *England* upon actions upon notes of hand, under the general plea of *non assumpsit*, usury has always been given in evidence; *Bull. N. P.* 152. *Esp. Dig.* 168. and remark the reason, "*because the contract is absolutely void*;" 1 *Selwyn's N. P.* 106. 1 *Str.* 498. *Fortesc.* 336.; and it is every day's practice at *Nisi Prius*.

But it will be said, that in *England*, the consideration of a note of hand may be inquired into, and it is not a specialty; whereas in *Connecticut* the consideration of a note of hand cannot be inquired into, any more than the consideration of a bond; our notes of hand being specialties, like bonds in *England*.



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As to the first part of this objection; it may be remarked, that after a note of hand is negotiated in *England*, the consideration cannot be inquired into there any more than here; and yet usury may be given in evidence under the plea of *non assumpsit* as well to a note that has been negotiated as to one that has not. This proves, that because the consideration of an instrument cannot be inquired into, is no reason why usury may not be given in evidence under the general issue.

As it respects the second part of the objection, that a note in *Connecticut* is a specialty; this is denied. No adjudication of our courts upon the point, it is believed, can be produced.

By the *English* common law, a bond under seal is called a specialty. This, to wit, a specialty, is an instrument *sui generis*, known only to the *English* common law. By the civil law, no such instrument ever existed. To the law merchant it is an utter stranger; and I doubt much whether the law of *Connecticut* recognises any such instrument; for a bond here without a seal is, of precisely the same validity and of precisely the same character, in every point of view, as a bond with a seal. But it is, by the *English* common law, the seal, which gives a specialty its peculiar character. It would be curious and useful, though not pertinent to the present argument, to trace through the *English* common law the history of sealed instruments and specialties.

By the *English* common law, the consideration of a specialty is sealed up; it will support an action *per se*. And it is said, so is a note in *Connecticut*; and hence they are alike. These two instruments indeed, have these characteristics in common; but it by no means follows that they are alike. The consideration of a bond cannot be inquired into on account of the solemn-

nity of the seal; and for the same reason will of itself support an action. But the consideration of a note cannot be inquired into, because the maker, under his own hand, has acknowledged that he has received the value; and is estopped to deny it. But a bond does not in form acknowledge, nor purport to be made for any consideration. A note will support an action *per se*, because it contains, upon a sufficient consideration, an express promise to pay; and this is the only reason. Every written contract, upon a sufficient consideration expressed upon the face of it, and a promise made in consideration thereof, is as much a specialty as any instrument known to our law.

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The form of actions on notes immemorially established, and uniformly pursued in *Connecticut*, shows that a note of hand has never been considered as a specialty, though an instrument equally efficient to all valuable purposes. The common form is a neat draft of a declaration in *assumpsit* upon an express written contract. The plea generally made, as the general issue, is *non assumpsit*; though *non est factum* is often pleaded. Hence I conclude, that, though a note of hand is, by our law, of equal validity, it is neither in form nor substance, a specialty; and that under the plea of *non assumpsit*, usury may be given in evidence.

But it will be said that our superior court have often decided that usury must be pleaded; and that for many years this has been the uniform practice.

It is to correct this very practice that this writ is brought to this supreme court of errors. This objection might have weight in the superior court; but can have none here.

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2. Whatever may be thought of the common law, the statute relating to *pleas and pleadings* is conclusive upon the point. If the legislature could, by the most explicit language, bind the courts down to a certain rule relative to what may be given in evidence under the general issue, they have done it. See *Stat. Conn.* tit. 129. By the 4th *sect.* of this act, the defendant may, under the general issue, give in evidence his title, or any other matter in his defence, or justification, as the nature of the action may be, excepting *only* a discharge, &c. Comment will not make this clause clearer. A more direct unambiguous expression the *English* language does not afford.

But it may be said there has been a long contemporaneous construction of this statute, that usury cannot be given in evidence under the general issue; and that *communis error facit jus*. Contemporaneous construction may serve to explain a doubtful statute, but can never repeal a clear one. This statute is not ambiguous. No man can mistake its meaning. It is clear, explicit, and derides all comment.

*Daggett and N. Smith, for the defendant in error.*

1. Usury cannot be given in evidence under the general issue in an action founded on a specialty. In *Great Britain*, the decisions on this point have been uniform. The reason is, that when you undertake to avoid so solemn an instrument as a specialty is, you must state your ground of avoidance specially in your plea, that the court may see what it is, and the adverse party may be prepared to meet it. In an action on a specialty, the general issue brings in question nothing but the *execution*. The plaintiff comes prepared to prove nothing else. To admit proof of usury under this issue would be an unwarrantable surprise upon him. The plaintiff



has informed the defendant what he claims of him. The defendant ought to apprise the plaintiff of his defence. And the ground of defence ought to be brought to a point. It is the excellence of special pleading that it has this effect.

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The question then arises, are notes of hand in *Connecticut* specialties? It will be difficult to show why they are not. They are of the same validity; the consideration of them can no more be inquired into; and the invariable practice has been to declare upon them in a similar manner. [TRUMBULL, J. I imagine that the origin of our considering a note as a specialty was an old statute prescribing the *form of action*, which, contrary to the *English* practice, was *upon the note*. The general issue was, of course, *non est factum*. Since I came to the bar, the practice of pleading *non assumpsit* has been introduced, though I admit, properly enough.] It is true, that *non assumpsit* has been pleaded to actions on notes. But it has never been decided, that this was a proper plea. The practice of pleaders cannot alter the law. But if long practice may be urged as *evidence* of the law, we, on our part, may with great propriety avail ourselves of it, to show that in such an action as this, and under such an issue as is here joined, usury cannot be given in evidence. How long the practice of pleading usury specially has prevailed cannot be ascertained; certain it is, that in 1787 it was considered as settled. [REEVE, J. It was not the practice originally to plead usury specially, but to give it in evidence under the general issue. It was not, however, considered a very good practice. SWIFT, J. There was a case at *Tolland*, before the whole court, consisting of six judges, in which it was decided, that usury must be pleaded.]

2. The statute regulating *pleas and pleadings* does not apply to this case. That statute authorizes the defendant to give in evidence such matter only as is per-

June, 1808. *tinent to the issue. But when the defendant pleads non assumpsit, or non est factum, usury is not put in issue ;*  
 CULVER *because he denies that he gave the note.*  
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*By the Court, MITCHELL, Ch. J. SWIFT, TRUMBULL and BALDWIN, Judges, dissenting. The statute of this state regulating pleas and pleadings must govern the case ; and by that statute, the defendant has liberty to give in evidence, under the general issue, any special matter in his defence, or justification, excepting only " a discharge from the plaintiff, or his accord, or some other special matter, whereby the defendant, by the act of the plaintiff, is saved or acquitted from the plaintiff's demand." (a) The special matter, which must be pleaded, is such as arises subsequent to the plaintiff's demand, and which saves or acquits the defendant from a right of action which once existed against him ; whereas usury evinces a total want of any ground of action originally, and may therefore be given in evidence under the general issue. The court are aware of inconveniences which may arise from this practice ; but the statute is imperative ; and by a rule of court, that notice of the defence shall be given, (c) the inconveniences will be prevented.*

(a) *Stat. Conn. tit. 129. s. 4.*

(b) See the rule alluded to at the end of this term.

JUSTUS RILEY *against* ROGER RILEY.

### MOTION for a new trial.

Letters of administration granted under the authority of another state, are of no avail in this.

On the trial of this cause in the *superior court*, it appeared that the plaintiff was a creditor of the estate of *Moses Deming*, late of *New-Hartford* in the state of *New-York*, deceased ; and that personal property belonging to

that estate had come to the hands of the defendant, and had been disposed of by him. The plaintiff, therefore, claimed, that the defendant was liable as *executor de son tort*.

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The defendant resisted this claim on the ground that he was authorized to receive and dispose of the property in question by *Jedediah Sanger*, to whom letters of administration had been granted, by the surrogate of *Oneida* county, in the state of *New-York*; and offered such letters, duly authenticated, in evidence. The plaintiff objected to their admission, on the ground that letters of administration granted in the state of *New-York* were of no validity in this state, and that the defendant could derive no authority therefrom to receive and dispose of the goods of the deceased. But the court overruled the objection, and admitted the evidence offered; in consequence of which, the issue in the cause was found in favour of the defendant.

On motion of the plaintiff, the court granted a rule to show cause why a new trial should not be had; and reserved the question for the opinion of the nine judges.

*T. S. Williams*, in support of the motion.

The single question intended to be reserved in this motion for a new trial is, whether a grant of administration in the state of *New-York* will give a right to such administrator to commence a suit in this state, or control the personal property? For the defendant claims, that he has a right to the effects in his hands, by virtue of authority from the administrator in *New-York*. If, therefore, such administrator has no authority over the goods here, he can give none, and the defendant must be executor in his own wrong.

In *England* the king had formerly a right to all the



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And now no notice is taken of a grant of administration in a foreign country. If one dies in *France*, leaving goods in the diocese of *N.* in *England*, the bishop of *N.* must grant administration. 11 Vin. Abr. 73. 76. Palm. 163.

And in *Tourton v. Flower*, 3 P. Wms. 369. the Lord Chancellor says, our courts take no notice of what is done in the spiritual courts beyond sea; as in case of administration granted in *Paris*. 11 Vin. 78. 2 Com. Dig. 256.

The same principle is recognised in a late case in 8 Ves. jun. 44. And this principle applies not only to grants of administration in countries strictly foreign; but to grants in *Ireland*. 11 Vin. 76. Freem. 102. 2 Lev. 86.

Nor will grant of administration in *England* extend to the colonies in *America*. 2 Atk. 63. This is also admitted in argument in *Wright v. Nutt*, 1 H. Bl. 146. 154. And this is not the law of *England*, merely. But the principle has been recognised in almost every state in the union. In *Pennsylvania*, in the case of *Græme v. Harris*, 1 Dal. 456. it was holden, that letters of administration granted by the archbishop of *York* had no effect there.

So also have been the decisions in *North Carolina*. 1 Hayw. 354. In *New-York* it does not appear that the *English* law has ever been questioned; but the invariable practice is in pursuance of it.

And it is recognised as the law of *Massachusetts* in a very recent case of *The Selectmen of Boston v. Boylston*, 2 *Mass. Rep.* 384.

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Such also have been the decisions in the courts of the *United States*. 1 *Cranch*, 268. 278. 282. And so far has this principle been extended by the *supreme court* of the *United States*, that letters of administration granted in what is now the district of *Columbia*, while it was a part of the state of *Maryland*, were holden to be invalid, after that territory was placed under the jurisdiction of the *United States*. *Dixon v. Ramsay*, 3 *Cranch*, 323.

It is objected, that the reason of the rule is local; and therefore should not be adopted here.

But such a rule existing in other states and countries is of itself a reason for our adopting it; otherwise, our citizens would be subjected to the disadvantages of the rule in other states, and the citizens of those states would derive the same benefit in this state as our own citizens. For instance, a man dying in *New-York* leaves goods in that state and in this. The administrator there draws from this state the goods here; and our citizens must go into *New-York* in pursuit of their claims. But they there find that the whole estate is absorbed by judgments and bond debts. Whereas, had the *New-York* creditors been compelled to come into this state, where no such preference exists, our simple contract creditors would have divided the estate equally with them. The state, too, in this way may lose the priority to which it is entitled; as upon this principle, instead of retaining the goods of its debtor for a debt due the state, it tamely yields those goods to the jurisdiction of another state, and consents to share equally with the creditors of that state, or even to be postponed to them.

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Again: Is it reasonable that we should yield to them what they deny to us? Shall they gain both by their own rule, and by ours? And shall our citizens lose by both? Is it not the duty of a government, as well as of an individual, first to provide for those of its own household? And shall our citizens be forced to apply to a foreign government, or another state, for that justice which it is in the power of our own government to grant them;—especially when that state, or government, in similar circumstances, will not drive its citizens to go to ours for redress; but makes use of the means in its own hands for that purpose? Justice to our own citizens requires that a principle of reciprocity be established.

Besides, when we know that other states have adopted the *English* rule, we may fairly infer that they expect a similar rule to be adopted against them; and therefore, when they grant administration, they do not expect that such a grant would have a greater effect than they themselves would give to a similar grant; and that they do not intend to affect the goods out of their jurisdiction. No reason can be given why our courts should give a greater extent to this grant than the court which made it would have done. But it is objected, that the decision of our own courts have been contrary to the *English* practice. They have decided in one case, that being qualified to act as executor in a foreign country would not qualify them here. *Perkins v. Williams*, 2 *Root*, 462. But it is admitted, that the course of decisions in this state has been, that an administrator or executor deriving his authority from a *sister state* could exercise that authority in this state.

But upon examination, it will be found, that those decisions arose, not from an intention on the part of the courts to alter the law of the country; but from a con-



vention entered into by the legislature with some of the other states. June, 1808.

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In the year 1648, the commissioners of the four *United Colonies* proposed and recommended to the general courts, that if the last will of any man be duly proved and certified from any colony, it forthwith be accepted and allowed in the rest of the colonies: and that, if any known planter or settled inhabitant die intestate, administration be granted by the colony to which the deceased belonged, though he died in another; and the administration being duly testified *to be of force* for gathering in the estate in the rest of the colonies. These propositions were, by the general court of this state, adopted, in *March*, 1648, upon this condition, however—"Provided the general courts of the other colonies yield their assent thereto."(a)

(a) The act passed by the legislature of *Connecticut*, then one of the *United Colonies*, was in these words:

*"At a session of the general court in Hartford, this 14th March, 1648.*

*"Whereas it was recommended by the commissioners, that for the more free and speedy passage of justice in each jurisdiction to all the confederates, if the last will and testament of any person be duly proved, and duly certified from any one of the colonies, it be without delay accepted, and allowed in the rest of the colonies, unless some just exception be made against such will, or the proving of it, which exception to be forthwith duly certified back to the colony where the said will was proved, that some just course may be taken to gather in and dispose of the estate without delay or damage. And also, that if any known planters or settled inhabitants die intestate, administration be granted by that colony unto which the deceased belonged, though dying in another colony; and the administration being duly certified to be of force for gathering in of the estate in the rest of the colonies, as in the case of wills proved, where no just exception is returned: But if any person possessed of any estate, who is neither planter, nor settled inhabitant, in any of the colonies, die intestate, the administration, if just cause be found to give administration, be granted by that colony where the person shall die and depart this life, and that care be taken by that government to gather and secure the estate, until it be demanded, and may be*

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From this convention, thus early entered into, we may fairly infer, that our ancestors considered the law of *England* upon this subject as binding upon them, until altered by the legislatures. And it is, therefore, by their opinion now in force, except where it has been thus altered: that they were careful not to change this law, except as to the citizens of those states that also made this change, and adopted the recommendation of the commissioners: and, consequently, that the principle of reciprocity, for which we contend, was in part established by the wisdom of our ancestors. And until it is shown that the state of *New-York* has adopted this convention; the very terms upon which the legislature of this state adopted these propositions prove, that the citizens of that state are not entitled to the benefit of them.

In point of practice, it is admitted, that this distinction has not been kept up, by our courts; but this has happened, it is presumed, from this circumstance, that the practice under this convention having been long gone into, and our courts having become familiarized to the idea of administrators appointed by other states bringing suits in our courts, the law which authorized it was forgotten, and it was considered as a general principle, that administrators from other states could bring suits in this. That this was the fact is evident from this, that in no case reported upon this subject decided by our courts, is this convention alluded to.

When, therefore, it appears, that these decisions of our courts are directly opposed to the letter and spirit

delivered according to rules of justice. Which, upon due consideration, was confirmed by this court, in behalf of this colony, and ordered to be attended in all such occasions for the future: provided the general courts of the other colonies yield the like assent thereunto." See 2 *Haz. Hist. Coll.* 124. 135.

of the act of the legislature, it is presumed that they will not be regarded as precedents in this court. But these decisions, it should be noticed, were as between the administrator and the debtor; but this case is between the foreign administrator and the creditors of the intestate.

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It is said, that one man may constitute an attorney, who may act for him as well in one state as another. This is admitted as to the property of the principal; but in this case, it is contended, that the principal, the administrator, has no interest in the property, which is out of his jurisdiction.

It is objected, that the decision contended for by the plaintiff is in violation of the constitution of the *United States*. It is a sufficient answer to this objection, that the *supreme court* of the *United States*, the peculiar guardian of the constitution, did not think such a decision as at all impugning that clause of the constitution.

But it is said, that the assignees of a bankrupt appointed in one country, may maintain an action in any other country. Lord *Kaimes*, however, says, that statutory transfers of property to assignees of a bankrupt, do not carry effects in *Scotland*. 1 *H. Bl.* 677.

And Chief Justice *Kent*, whose researches have been as great as those of any man in this country, says, that assignees of a bankrupt cannot sustain an action in their *own* name in *Great Britain*. 2 *Johns.* 344.

It is admitted, indeed, that *courts of chancery* have, in certain cases, interfered to protect the rights of assignees of bankrupts. *Solomons v. Ross*, cited 1 *H. Bl.* 132.



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In *Cleve v. Mills*, cited 1 *H. Bl.* 680. Lord *Manfield* says, the statutes of bankrupts do not extend to the colonies.

But if, as between the assignee and debtor of the bankrupt, the court would permit the assignee to sustain a suit, and would say, that it does not lie in the mouth of the debtor to object; would they therefore say, that as between creditors of a bankrupt, one of which claimed under the laws of a foreign country, by the title of the assignee, and the other was claiming under the laws of our own country, by virtue of an attachment, that the former must prevail? Are the court prepared to say, that if an *English* merchant has goods in this country, and owes debts here, and becomes a bankrupt, that the assignees may recover these goods, though attached by our own citizens; and that our citizens must cross the *Atlantic* in pursuit of them? This very case is mentioned in argument in *Hunter v. Potts*, 4 *Term Rep.* 190. and as what could not be expected.

The discharge of a bankrupt in *Maryland*, has been held not to operate upon his *English* creditors. *Smith v. Buchanan*, 1 *East*, 11.

The same point was decided in *New-York*, in the case of *Van Raugh v. Van Arsdaln*, 3 *Caines*, 154., and in this state, in the case of *Buell v. Shethar*, in *Litchfield county*. MS. And why the assignment should operate upon creditors who would not be affected by the discharge, seems unaccountable.

That the *English* law is in our favour is admitted. It must also be admitted, that this is considered law in the highest courts of our own country; that it was considered as law by our own legislature, at an early period of our country; and that this case is not within the

alteration then made. This principle, moreover, accords with the general principles of law; and its adoption becomes necessary for the security of our citizens. The disavowing of former decisions upon this subject can shake no titles to estates, and destroy no securities for debts. Nor does any reason exist, why the law should not be restored to what it anciently was; and the principle of reciprocity alluded to in the convention of 1648, be again established.

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*Dunbar and J. Trumbull, contra.*

*Moses Deming*, of *Connecticut*, being indebted to *Justus Riley*, removes to the state of *New-York*, and dies. *Jedediah Sanger* of *New-York* there obtains letters of administration on *Deming's* estate. *Roger Riley*, the defendant in this state, has received of the goods, &c. of *Deming* under an apparent authority from the administrator. The question arising upon these facts is, whether the administrator did or could convey any such authority to the defendant; and whether he is not executor in his own wrong? If the administrator had right to have come into *Connecticut* and to have possessed himself of this estate, he doubtless might have authorized the defendant. To decide the question whether he could do so or not, we must consider whether, in case of refusal to deliver, he could have maintained an action in character of administrator. That the laws of *England*, and some of the states in the union, do not allow an administrator, deriving his authority from the appointment of a court of foreign jurisdiction, to sue in their courts will be conceded; but that the law, or the reason of the law, in this state, is so, will be denied.

The right of granting administration is regarded by the *English* law as merely a matter of favour; and the reason why a foreign administrator cannot sue in *En-*

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The administration of intestate estates was very anciently performed by the king in person; or rather, he took to himself all the estate of those who died in this manner. Afterwards, and in favour of the church, as it is said, this privilege was granted by him to the reverend prelates; surely, not because the public good required it, but as a privilege, and for their private emolument, without their being even liable for the payment of debts. While this remained the law of *England*, the reason is obvious, why strangers were not allowed to sue in behalf of the estate of the intestate: it was, that the rights of this ecclesiastic would be affected, for he, in fact, succeeded to the possession, even in exclusion of creditors. Thus the law continued until the statute of *Westminster* 2. ordained, that the ordinary should be bound to pay the debts of the deceased; still, however, the remainder of the estate, if any, belonged to the ordinary, to be applied by him according to his conscience, or, in *fios usus*; yet, it will be remarked, that these "*fios usus*" were such as the ordinary chose to regard, and for the discharge of his duty in this respect he was accountable to no one. There is no reason, therefore, to say, that the estate did not absolutely belong to him. In the 31st of *Edward* III. the abuses of this authority had become so outrageous and insupportable, that by statute it was directed that the ordinary, instead of administering himself, should appoint the nearest and most lawful friends of the deceased. This was, indeed, a most deadly stroke to his power in this respect; but what remained was not as a new grant,



but only the residue of his former privilege. Thus, June, 1808,  
 arose the law of administrations in *England*; and so it  
 still remains, except with some few minor alterations  
 introduced by subsequent statutes. And hence it will  
 appear, that the reason why the deceased could never  
 be represented by an administrator deriving his autho-  
 rity from any other source, was not, that he would  
 otherwise be incapable, but because it infringed upon  
 this privilege of the ordinary, or metropolitan, as the  
 case might be. And this idea is still further enforced  
 from the recollection, that if the deceased had estate  
 in more dioceses than one, the granting of adminis-  
 tration belonged not to the ordinary, but to the arch-  
 bishop of *Canterbury* or *York*. From whence we learn,  
 that not only a foreign administrator could not sue, but  
 even a native residing in *England* could not do this, ex-  
 cept he derived his authority from those to whom it had  
 been graciously granted, and who had carved it up to  
 their own liking.

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A further argument in support of this position may be derived from the circumstance, that an assignee under a commission of bankruptcy may sue, as such, in a foreign country, for debts due the bankrupt. *Le Chevalier v. Lynch*, *Doug.* 170. 2 *Com. Dig.* 27. Now, an assignee, by the assignment from the commissioners, is no more completely invested with all the estate of the bankrupt, and all the rights and privileges annexed thereto, than this administrator; and if there is any reason why his power in this respect is more extensive, it must be because he represents a person in life, and the administrator a person who has ceased to live; the rights of both are equally created by act of law; nor do we find in this respect any difference made between an administrator and executor. And can the assignee have an authority more extensive than an executor, who is authorized and appointed by the testator for this ex-

June, 1808. press purpose? The reason, therefore, why a foreign administrator cannot sue in *England* is, that it affects the privileges of the consistory or prerogative courts.

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It will hardly be said, that the reason why administration is granted upon estates in *Connecticut* is, that the judge of probate may be benefited, or those who act under him. It is, that the property may be appropriated to the discharge of the debts of the deceased; and that the residue may be distributed to his legal representatives. A purpose much more *pious*, than the history of former times would induce us to believe operated upon ecclesiastics of the 12th century. The reason of the *English* law, therefore, in this instance, does not apply to the laws of *Connecticut*.

But it is objected, that the citizens of *Connecticut*, after having given credit upon the strength of property in this state, ought not to be driven into any other, to obtain payment of their just claims. We think we shall be able to show, that this will be unnecessary; because, if there be estate in *Connecticut*, it may be attached; at least, we see no reason to the contrary. It is true, the law does not permit the body of an executor or administrator to be attached, or imprisoned; and the reason is, that the debt is not his, nor is he under any personal liability to respond. This reason, however, extends no further; and on that ground, we contend, that the law extends no further. *English* precedents to this point cannot be found; but, in the commonwealth of *Massachusetts*, the practice is according to our proposition. *Precedents of Declarations*, 90. The writ directs, that the estate, &c. of the deceased be attached, and that notice, &c. be given to the administrator. By this means, the creditor is secured, and the rights of the administrator remain unviolated. We are sensible, that this has not been the practice in *Connecticut*; but, we see no

reason why it may not be, if the necessity of the case requires it; for the attachment of estate is considered as giving our courts jurisdiction. If it should be said, that the laws of *Connecticut* providing for the settlement of insolvent estates are repugnant to this doctrine, we answer, that those laws can never operate, unless administration be granted in this state, and then the case will be totally variant from the present; and if such be the laws of other states, which, however, does not appear, yet it will not affect our present question, because, the attachment here by a creditor who has not proved his debt under the foreign administration, will take precedence of any claim afterwards made by such administrator. This has been decided in the case of assignees in *Connecticut*, *Kirby*, 313.; and in *England* by Lord Mansfield, *Doug.* 170. But if we are incorrect in this position, we have still another answer, viz., that a court of chancery may interpose, and that the existence of estate in *Connecticut* will give jurisdiction. And if in either of these ways remedy may be had, the objection fails.

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And here we will inquire, if the deceased in his lifetime might have sued in this state for debts due him, why it is, that his executor who is by him appointed for this express purpose may not? The executor or administrator stands, to all intents, in the state of the deceased, except their bodies are not liable to arrest; and they are as fully empowered to do every thing in relation to the estate as an attorney can in any case be, or as an assignee under commission of bankruptcy. Indeed, the estate of the deceased may, in such case, be considered as the real party.

If, then, the reason of the *English* law does not apply, will the court find themselves bound by precedent?



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In the case of *Nicole v. Mumford, Kirby, 270.*, it is said, that an administrator being appointed in the state where the deceased dwelt, may in this state sue for the recovery of any property belonging to the deceased. The administrator in that case dwelt in *New-York* like the present. In the case of *Woodhull, &c. v. Gleason & Cowles*, in the *supreme court*, this doctrine was acknowledged; and the court will bear witness, that this has been the constant invariable practice in *Connecticut* for a long course of years: and although it is shown, that this law arose from, or perhaps rather was confirmed by, a convention between the *New England* states, yet in our practice, no difference can be shown between them and others. And so far from its proving to the contrary, it not only shows this to be the law of *Connecticut*, but that it has immemorially been so; and that without any evil consequences resulting.

The counsel for the defendant also relied upon the provision in the *Constitution of the United States*, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. *Art. 4. s. 1.*

BY THE COURT, unanimously. By the common law, the power and right of an administrator are given only by the court that appoints him. The power of an executor is given by the will of the testator; but his right to appear in any court, and the validity of his acts in that capacity, depend wholly on the probaton of the will by the prerogative court, within the limits of that local jurisdiction, in which he claims the power to act.

In *England*, a will must be approved in every prerogative court, within the local limits of whose jurisdiction the testator died possessed of *bona notabilia*, in



order to enable the executor to take possession of the goods. June, 1808.

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The courts of probate in *Connecticut* have, as to this point, a jurisdiction co-extensive with the limits of the state, and no more.

During the union of the four original colonies of *New England*, in 1648, it was proposed by the board of commissioners, that "if the last will and testament of any man be duly proved and certified from any one of the colonies, it shall be accepted and allowed in the rest; that if any planter or inhabitant die intestate, administration be granted by the colony to which he belonged, and the administration shall be in force for the gathering in the estate in the rest of the colonies." This proposition was approved and confirmed by the statutes of those colonies, and continued to be law, as long as those statutes remained in force. The statute of *Connecticut* was not repealed on the dissolution of the union, but was omitted in a subsequent revision of our laws. Still the practice has continued to allow, in our courts, the right of action to executors and administrators, empowered by the courts of the neighbouring states, and to consider all their acts in such capacity valid. This practice is not warranted by common law, or by any existing statute. It rests only on ancient custom; justified by convenience and reciprocity, so long as the neighbouring states allowed the same rights to executors and administrators, empowered by the prerogative courts of this state. The right is refused in the state of *New-York*. It has recently been denied in the supreme judicial court of *Massachusetts*.(a)

New trial to be granted.

(a) See the case of *Goodwin v. Jones*, in 3 *Mass. Rep.* 514.

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WEBSTER *against* WOODFORD.

A man may show, that he was *non compos mentis* in avoidance of his deed.

MOTION for a new trial.

This was an action of ejectment, to recover the undivided moiety of certain lands, which the plaintiff and *Timothy Webster* had conveyed to *Miller Fish*. Upon trial of the cause, at *Hartford*, *February* term, 1808, a verdict was found for the plaintiff. A motion for a new trial was then made by the defendant, and the following reasons assigned; viz. that the court admitted the plaintiff to prove, as the sole ground of his right of recovery, that the plaintiff was a man of weak capacity, and thereby incompetent to convey estate; that the court admitted the plaintiff to go into the proof respecting the weakness of his understanding, in contradiction to the acknowledgment of two certain deeds of bargain and sale made and acknowledged before a justice of the peace, on the 17th day of *May*, 1799, which deeds conveyed the demanded premises to *Miller Fish*; that the court admitted the plaintiff to produce proof as to the value of the demanded premises, as evidence to show, from the inadequacy of price, that the plaintiff was a man of weak capacity. A rule to show cause was therefore granted; and the question reserved to be argued before the nine judges.

*Goodrich* and *Dwight*, in support of the motion, argued,

1. That weakness of understanding does not incapacitate a man to contract.
2. That no man can avoid his own deed, by stultifying himself.

1. There is a distinction, always to be regarded, between idiocy, and weakness of understanding; the one supposing a total destitution of mental capacity, the other implying the existence of understanding, though in a small degree. The term *non compos mentis* does not apply to a person of weak capacity, but only to one who possesses not the exercise of reason. It is the latter description of persons only, whose acts are void or voidable, merely for defect of understanding; and such only are contemplated, in *England*, by the statute 17 *Edw. II.*, which was declaratory of the common law. 4 *Rep.* 126. For no person of the age of discretion, is, in law, presumed to be *non compos mentis*, and therefore is not to be restrained in the exercise of any lawful right, until he is ascertained to be so, by a commission issued for that purpose from the court of chancery. 3 *Bac. Abr.* 528. On this fact being thus found, the law gives the custody of the person and his estate to the king, that the person may be protected from harm, and the estate from waste. The immediate care of the lunatic may, however, be intrusted to one commissioned for that purpose, whose acts are subject to the control of the court of chancery. 3 *Bac. Abr.* 529. Hence originated our statute authorizing the appointment of a conservator; which gives to that officer the same authority which is possessed by the committee of a lunatic, and vests in the county courts powers similar, in this respect, to those of the court of chancery. This statute, directing the manner in which such persons, if without property, shall be supported, speaks of persons "naturally wanting of understanding, so as to be unable to provide for themselves," and of such as, "by the providence of God, fall into distraction, and become *non compos mentis*;" and of those who, "by age, sickness or otherwise, become poor and impotent.(a) And

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(a) *Stat. Conn.* tit. 88. c. 1. s. 1.



June, 1808. in a subsequent section, it is said, " But if *such idiot*, WEBSTER distracted or impotent person have any estate, the county V. court of that county where they dwell, may order and WOODFORD. dispose thereof." Here, while we remark, that the object of this statute appears to be the same with that of 17 *Edw. II.*, the phraseology used in this section is to be particularly observed, as it shows, precisely, what description of persons was meant by those who are *naturally wanting of understanding*, mentioned in the first section. For, however reasonably the term, in itself, might be taken to extend to a person of *weak understanding*, yet since, referring to these persons, the phrase *such idiot*, is used in the subsequent section, this latitude of construction is evidently forbidden; and the meaning of the statute, in this part of it, confined to idiots, distracted persons, and those who by age, sickness or otherwise, become *poor and impotent*. The statute 17 *Edw. II.* says nothing of persons of weak understanding, but speaks only of *natural fools and lunatics*. *Bac. Abr.* 529.(a) Our statute, indeed, in another part (sect. 8.) goes farther than this, and provides, that if the selectmen " shall find any person or persons, that are reduced, or are likely to be reduced, to want, by *idleness, mismanagement, or bad husbandry*, that then such selectmen may appoint an overseer to advise, direct and order, such person in the management of his business;" and that " no such person, while under such appointment, shall be able to make any bargain or contract, without the consent of such overseer, that shall be binding or valid in law." But on the subject of persons of weak mind, the statute is everywhere silent. By neither of these statutes, then, are such persons rendered incapable of making contracts. And although many cases have occurred, in which it appeared that advantage had

(a) See also Lord *Donegal's* case, 2 *Ves.* 407. *Ex parte Barnesley*, 3 *Atk.* 168.



been fraudulently taken of the imbecility of such persons, and, on that ground, their contracts have been annulled; yet it has been uniformly held, that where that reason did not exist, they were not to be relieved, either at law or in equity. 1 *Fonbl.* 57. 3 *P. Wms.* 129. *Osborne v. Fitzroy.* "Where a weak man gives a bond, if there be no fraud, or breach of trust, in obtaining it, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity." In the case of *Bennet v. Vade*, 2 *Atk.* 324., on a bill brought by the heir at law of Sir John Lee, to set aside the conveyance of his estate, upon a suggestion of fraud and imposition, Lord *Hardwicke* agreed, "that if Sir John Lee was not insane, but only weak, he might do an act that will bind him; for there cannot be two rules of judging at law and in this court upon the point of insanity." If, then, mere weakness of understanding does not incapacitate a man to contract, it follows, that when he contracts without fraud or imposition, his contract is binding. That this sale was affected in consequence of any fraudulent practices on the part of *Fish* does not appear. Nor is any other mark of fraud suggested, than that the price was inadequate to the real value of the land. It is conceded that such a circumstance as total inadequacy of price, coupled with great weakness of mind, in the grantor, will raise strong presumption of fraud; but the facts which appear in this case authorize no such presumption. Indeed, the court admitted proof of the value merely as evidence of *Webster's* weakness, and not of fraud or oppression on the part of *Fish*.(a)

(a) How far inadequacy of price will operate to vacate a contract, see *Ambl.* 18. 1 *Bro. Chan. Rep.* 9. 2 *Bro. Chan. Rep.* 175. 179. 10 *Ves. jun.* 474. 7 *Ves. jun.* 30. 8 *Ves. jun.* 137.

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June, 1803. [The counsel for the plaintiff here objected, that on the trial of the cause, they did not proceed on the ground that the plaintiff was a man merely of weak understanding, but that he was *non compos mentis*.]

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SMITH, J., on referring to his minutes, then stated— That on the trial of the cause, the defendant having given in evidence two certain deeds from the plaintiff and his brother *Timothy Webster*, conveying all the lands in question to *Miller Fish*, the defendant's counsel objected to the admission of evidence to prove the incompetency of the plaintiff to convey lands; because the deed, having been acknowledged before a public officer, authorized to take such acknowledgment, there could be no averment against such solemn act; and because no man can be permitted to allege his own incapacity to avoid a conveyance. The court overruled the objection, and admitted the evidence.]

This statement of the case seems not very obviously to present a specific question. Are we to argue the point, that proof of the plaintiff's *incompetency to convey* should not have been admitted? If the evidence offered were, generally, that he was *incompetent*, without showing the reason of the incompetency, whether *infancy*, *idiocy*, *lunacy* or *imbecility*, the point would scarcely admit of argument. If the point is, that *no man* can allege his own incapacity, we have no case; because *infancy*, clearly, may be alleged.

[TRUMBULL, J. I understand the question, upon the statement, to be, whether a man may be allowed to stultify himself.]

That a man cannot stultify himself, to avoid his own grant, is a well established principle of the *English* law. It is so said by *Littleton*, sect. 405.; and has been so

held in a multitude of cases, since his time. In *June, 1808. Beverly's case, 4 Rep. 123.*, it was resolved, "that every deed, feoffment or grant, which a man, *non compos mentis*, makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself, and disable his own person." A contrary opinion is, indeed, given by *Fitzherbert. F. N. B. 449. D.* But in the case of *Stroud v. Marshall, Cro. Eliz. 398.*, in debt on an obligation, *non sane memory* was adjudged to be no plea; and the opinion of *Fitzherbert* expressly held to be not law. So also *Co. Litt. 247.* And in *Cross v. Andrews, Cro. Eliz. 622.*, an action on the case against an innkeeper, for not keeping the goods of his guest safely, in which the defendant pleaded that he was sick, and of *non sane memory*; this plea was held insufficient, because "it lieth not in him to disable himself no more than in debt upon an obligation." The principle is also recognised by Lord Holt, in *Thompson v. Leach, 1 Ld. Raym. 315.*; and is found in 3 *Com. Dig. 483. D. 6.* 3 *Bac. Abr. 537.* 15 *Vin. Abr. 137. D. 2.* 1 *Fonbl. 45.* The utmost danger is to be apprehended in admitting the doctrine, that a man may stultify or disable himself in court; as it is a direct contradiction to a plain maxim of the common law; as it would give rise to endless disputes, and would afford ample scope for fraudulent practices. It need not be denied that inconveniences may sometimes result from the doctrine for which we contend. If this were a sufficient objection, it might be made, with equal reason, against the establishment of all general principles. The inconveniences to be feared from admitting the maxim of the common law, are, however, comparatively small. With respect to absolute idiots and madmen, the danger is nothing. But from the least portion of intellect to the greatest, the gradations are innumerable; and who shall determine at what point in-

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tellectual weakness ends, and idiocy begins? There is, and can be, no standard of mediocrity. Leave men to the plain principles of the common law, and friends will take care of the weak and incapable. But if it is once understood, that the contracts of a person *non compos mentis* are void, all very weak men, if their friends shall think it for their interest, may be made, for this purpose, *non compos mentis*; and the imagination can scarcely explore the field of mischief to its limits. After all, we are aware it may be said, that this doctrine has been exploded in this state. It is true, cases have occurred, within the last fifty years, in which it has been held, that a man might stultify himself. Such decisions are found, however, only in this state; and our own state of society offers no reason to show that the operation of the *English* common law would be inequitable here. It cannot truly be asserted, that the adoption of this principle would create new rights, inconsistent with those which the contrary decisions have conferred; because this is not one of those cases in which a great mass of property has conformed itself to the decisions. By the *English* common law, the disability of a grantor to avoid his own deed, by showing insanity, affects not the rights of his heir or executor; since, for them, this is good reason to avoid the grant; (4 *Rept.* 124.) and the heir may even enter without a *scire facias*. 15 *Vin. Abr.* 136. D. As to the lunatic himself, the provisions of our statute sufficiently protect him. But if he be permitted to plead his own insanity, within what limits shall this liberty be confined? Suppose one called as a juryman declares himself insane. Is the fact then to be ascertained, and the question settled? Or one is elected to an office, and makes the same objection to serving. The same question is to be settled before he can legally be excused. An idiot or lunatic is certainly to be considered as personally removed from all civil ob-



ligations and duties to society.(a) But surely he should not be thus discharged, on his own plea, in a mere civil action. The public have an interest in the question; and no man should be disfranchised or discharged from his public duties, until his idiocy or lunacy has been solemnly established by a public inquisition. And can the law be called a safe one, as it respects the public, or individuals, that a man may, by mere civil plea, discharge himself from his duties to society, and cut himself off from its privileges? In criminal cases, indeed, the party accused may excuse himself on the ground of insanity; and with great propriety; for the law, here, only concurs with reason and humanity, which revolt at the idea of punishing a man for the commission of a crime of which he must have been unconscious, and the restraints to which have been removed by the mere act of Providence. But in such cases, the question of insanity is decided on a charge made by the public, in an issue to which the public is party. It is also unavoidable; because we are under a necessity either to admit the plea, or run the hazard of punishing a man who is not a moral agent. It may be said, on the whole, that this is always a question of much importance; deeply affecting the welfare of the party, and the interest of his friends; and one in which society have a near concern. Its determination should, therefore, be accompanied with more solemnity and caution than can attend the hearing of an incidental plea in a civil action.

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In addition to the reasons alleged against the general doctrine, it is to be observed, as to this particular case, which is an action of ejectment in the usual form, that from the declaration the defendant has no notice of the

(a) "Fools and madmen are tacitly excepted out of all laws whatsoever." 15 *Fin. Abr.* 137.

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*E. Perkins and Brace, contra.* The doctrine, that a man can in no case be admitted to stultify himself, although now received to be law in *England*, was not anciently so considered; nor has it been, in modern times, universally approved of, or acquiesced in; for to some, as is said by Lord *Coke*, the civil law, by which all acts done by idiots or persons *non compos mentis*, without their tutor, are utterly void, seems more reasonable than the common law. *4 Rep.* 126. There is, in fact, much absurdity in permitting persons under the age of twenty-one years, to avoid their own deeds, because they are supposed wanting in discretion to contract, and yet denying this privilege to idiots and lunatics, who must be, at least, equally destitute of discretion. The common law, indeed, tacitly admits this absurdity; for while it leaves utterly without remedy the party from whom Providence has withheld the means of self protection, and who, therefore, more needs the protection of the law, it still makes the grant of a person *non compos* voidable by the king, and by the representatives of the grantor. What good reason, if any, there may have been for the distinctions which are found(a) between the cases of infants and persons *non compos*, as to their capacity to contract, and for many consequent distinctions, it is now impossible to discover. These distinctions, which seem to have been the result of a departure from the course which common sense dictates, *Fitzherbert*, in his comments on the writ of *dum fuit non-compos mentis*, does not scruple to reject as groundless. His opinion has been alluded to, and is strongly opposed to the modern doctrine. "Some have said, that writ lieth not by him who alieneth the land, because he shall not dis-

(a) See *Co. Litt.* 247. *4 Rep.* 125.

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able himself, nor contradict his own deed; but that seemeth to be little reason; for this is an infirmity which cometh by the act of God, and it standeth with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." He then shows an analogy, as to want of discretion, between *insanity* and *infancy*; and because an infant may allege that he was within age at the time of his feoffment, "*à fortiori*, then he who is of *non sane memorie* shall allege that he was not of *sane memorie* at the time of his feoffment or grant, for he who is of unsound memory hath not any manner of discretion." In this opinion, although it has been held no law, *Fitzherbert* is not singular. The same has been, at least, intimated by Sir *William Blackstone*, 2 *Com.* 296.; and *Buller's N. P.* 172., says "The defendant may give in evidence that he made him sign it (an obligation) when he was so drunk that he did not know what he did; or that he was a lunatic at the time." This was done in the case of *Yates v. Boen*, 2 *Str.* 1104. And in *Thompson v. Leach*, 3 *Mod.* 310., the court expressly say, that the grants of infants and persons *non compos*, are parallel, both in law and reason; and that as there are express authorities(a) that a surrender made by an infant is void, therefore, the surrender then in question, made by a person *non compos*, was also void. Though this conclusion will not, perhaps, be denied, it will still be said, that the reason for which the grant is void, if it be insanity, and not infancy, is not to be shown by the party himself. But why is not the parallel to be carried through? Because, in the language of the common lawyers, "when he recovers his memory, he cannot know what he did when he was *non compos mentis*." This, in reality, is exactly the reason that common sense would suggest, why he *should be* permitted to avoid his

(a) *Lloyd v. Gregory*, Cro. Car. 502



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grant. The reason, however, has been perverted to a wrong application, by indulging in speculations too refined for useful practice, but which cannot, perhaps, easily be shown, on abstract principles, to be false. A man, it is said, cannot remember an act done by him while he was devoid of reason and of memory; and must, therefore, afterwards be unable to say any thing respecting it. Without inquiring how far mental derangement may impair the memory, we venture to say, that the *fact* may as safely, and as consistently with good sense, be allowed to be *put in issue* by the party himself, as by his *heir* or his *executor*. In criminal cases, this is always permitted, though it would be difficult to show, that criminal acts committed by the party during his insanity can better be remembered by him, than acts of a different nature. The maxim, however, there is reason to believe, is peculiar to the common law of *England*; and was, as we are told by *Fonblanque*, "endeavoured to be set up by the common lawyers in defiance of natural justice, and the universal practice of all the civilized nations in the world." Certain it is, the maxim has not yet been adopted in *Connecticut*, but has been opposed by many contrary decisions; as is agreed by the counsel for the defendant. Here, indeed, the reasons against the adoption of this doctrine, aside from these decisions, apply with peculiar force; because here a *scire facias* does not lie to avoid the alienations of a person *non compos mentis*; nor can actions against him be set aside by *supersedeas*, as in *England*. So that, notwithstanding the provisions of our statute, he is left without efficient protection, if his plea of *non sane memory* is refused.

By THE COURT unanimously. It is not a question, whether a deed, executed by a person *non compos mentis*, is voidable, for want of capacity in the grantor to convey. All admit that it is; and that such a deed may be



avoided, in a court of law, by the heirs of the grantor; June, 1808. although, it is said, that by the common law, this cannot be done by the grantor himself. That this doctrine is supported by decisions of the *English* courts is true; WEBSTER  
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and the reason assigned by those courts is, that a man shall not be admitted to stultify himself. But this was not always the common law of *England*. Certain it is, there is a writ in the *register* given to a man who has been insane, and who, during his insanity, has aliened his land, to recover it, after his reason is restored. In the time of *Edward* the First, *non compos mentis* was allowed to be a sufficient plea to avoid a man's own bond. It was not until the reign of *Edward* the Third, that any scruple was entertained respecting the power of a person, who had been *non compos mentis*, to avoid his act; and it was as late as the reign of *Henry* the Sixth before there was any judicial determination, that a person who had been *non compos mentis* could not avoid a deed given by him, during his insanity. This determination was followed by similar decisions, and received by most of the *English* writers to be settled law. Justice *Blackstone* observes, that this doctrine sprung from loose authorities; and he manifestly approves the opinion of *Fitzherbert*, who rejects the doctrine, as contrary to reason. He says also, that later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it. This rule has been supported with great earnestness by *Powell*, who gives a reason in support of it, which is not to be found in the books, viz. that a different rule would open a door for fraud; because a man might feign himself *non compos mentis*, that he might enjoy the privilege of avoiding his contracts, if he chose to do so. This reason affords no additional support to the opinion, that a person *non compos mentis* cannot avoid his deed; since the same temptation exists, in the present state of things, to commit fraud; for although the person cannot, himself, avoid his deed,

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by showing insanity, yet by a proceeding in *England*, founded upon a writ issuing out of chancery, to certain commissioners, a person may be found *non compos mentis*, and immediately, in his life-time, a *scire facias* may issue in the name of the king, who by law is guardian to all persons *non compos mentis*; and the deed of any one who is so found, by the proceeding, may thus be avoided. Application may also be made, in such cases, in chancery, by the attorney-general to vacate the deeds. Thus, that which cannot be done directly, by the insane person himself, in the ordinary mode of proceeding in courts, may be done circuitously, and that in the life-time of the insane person. The temptation to fraud is, therefore, as great as if he were allowed to plead his incapacity in the ordinary method. When we find that the ancient common law was, that a man might allege his own incapacity to avoid his deed, and that this remained law during a long period of time, and has never been altered by any legislative act, but the contrary doctrine depends upon decisions of courts, in direct opposition to the common law, whose business it is to expound, and not to make, the law; and that these decisions have been rejected as not law, by some of the most eminent lawyers, and with reluctance submitted to by others, who reprobate them as productive of great inconvenience; and that we have no such proceedings by *scire facias*, or bill in equity, to avoid the acts of a person *non compos mentis*, during his life; and that, if this be done at all, it must be by such person's alleging his incapacity, as is done in this case—we are not inclined to advise a new trial.

New trial not to be granted.

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JOHN KNOWLES *against* THE STATE OF CONNECTICUT.

## WRIT of error.

This was an information in the county court against the plaintiff in error, by the attorney for the state, for a certain exhibition in the city of *New-Haven*. The supposed offence was charged as follows: That said *John Knowles* did at *New-Haven*, on or about the 8th day of *December*, 1807, at the corner of *Elm-Street* and *College-Street*, near the dwelling-house of *Daniel Candee*, in said *New-Haven*, unlawfully exhibit and hang up at the corner of said streets, in the view of many of the good people of this state, an indecent and unseemly picture or sign, thereby representing a horrid and unnatural monster; which said representation was made upon canvass; and at the bottom of said canvass the said *Knowles* caused to be written the following words, viz. "THIS ASTONISHING MONSTER TO BE SEEN HERE." And the head of said monster, represented by said picture, resembles that of an *African*, but the features of the face are indistinct: there are apertures for eyes, but no eyes; his chin projects considerably, and the ears are placed unnaturally back, on or near the neck; its fore legs, by said picture, are here represented to lie on its breast, nearly in the manner of human arms; its skin is smooth, without hair, and of a dark, tawny, or copper colour. And the said attorney further informs, that said picture or sign of said monster was by said *Knowles* placed at the corner of said streets, in the view of great numbers of the good people of this state, who saw said picture or representation as aforesaid. And the said attorney further informs, that immediately after the said *Knowles* had placed said picture as aforesaid, viz. on or about the 8th day of said *December*, the said *Knowles* did place

Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law.

If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplusage, and will not vitiate.

An information for an exhibition of a show, must particularly state the circumstances in which the indecency, barbarity or immorality of it consists, that the court may judge whether it is an offence within the statute tit. 116. s. 1. or at common law.



June, 1803. and carry into the dwelling-house of said *Candee*, (if  
 KNOWLES being a public house,) the *monster* represented by said  
 v. picture and representation; and the said *Knowles* did  
 THE STATE. then and there unlawfully expose, and exhibit, and show  
 said *monster* as a *show*, to divers good people of this  
 state; and did then and there take and extort from di-  
 vers good people of this state, large sums of money for  
 exhibiting and showing said *monster* or *show* to them as  
 a *show*. And the said *Knowles* did then and there, in  
 an unlawful manner as aforesaid, expose said *monster* to  
 persons of all ages, and both sexes; and did thereby  
 terrify many of the good people of this state; which  
 said *monster* was highly indecent, and improper to be  
 seen, or to be exposed as a *show*. And the said picture  
 was placed at the corner of said streets, with intent to  
 notify all persons that said *monster* was to be seen at  
 the house of said *Candee*, and to invite them to call  
 and see the same; which was to the great annoyance  
 of the good people of this state: all which conduct  
 of the said *Knowles*, as aforesaid, was, and is, against  
 the peace, highly indecent, of public evil example, and  
 against the statute law of this state, in such case made  
 and provided.

The defendant pleaded *not guilty*; and the jury found  
 a verdict against him. He then moved in arrest of  
 judgment, for the insufficiency of the information. The  
 court adjudged the information sufficient; and inflicted  
 a fine upon the defendant of sixty dollars. On a writ of  
 error, that judgment was affirmed by the *superior court*.  
 To reverse those judgments, the present writ of error  
 was brought.

*Daggett* and *Staples*, for the plaintiff in error.

1. This information purports to charge an offence  
*contra formam statuti*. The only statute which is relied

on, as bearing upon the case, is that for the suppression of "*Mountebanks*," tit. 116. The first section of that act is as follows: "That no mountebank, tumbler, rope-dancer, master of puppet-shows, or other person or persons, shall exhibit, or cause to be exhibited, on any public stage or place whatsoever, within this state, any games, tricks, plays, shows, tumbling, rope-dancing, puppet-shows, or feats of uncommon dexterity or agility of body, or offer, vend or otherwise dispose of, on any such stage or place, to any persons so collected together, any drugs or medicines recommended to be useful in various disorders." But we contend that the information charges no offence within these words.

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It is not alleged that *Knowles* exhibited any games, tricks, plays, tumbling, rope-dancing, puppet-shows, or feats of uncommon dexterity or agility of body; nor that he offered to vend or dispose of any drugs or medicines. The word "*shows*," then, is the only one which can touch this case. But can it be supposed the legislature, when they used that word, had any reference to natural curiosities? If so, every thing that is vulgarly called a *sight*, or *show*, is within the statute. The worthy farmer at *East Windsor*, who exhibits his large ox, is a great offender; so is the keeper of the museum in *Hartford*; and so are the scientific gentlemen who gathered, and now show to their friends, fragments of the meteor that lately exploded over *Weston*. Whether the exhibition is made gratuitously, or not, makes no difference; for the statute says nothing about the "*shows*" being made for money.

But of whatever nature the exhibitions may be, which the statute prohibits, we contend that *Knowles* does not come within any of the descriptions of *persons* therein specified. He is not described as a mountebank, tumbler,

June, 1808. rope-dancer, or master of puppet-shows. If included  
 KNOWLES at all, he must, then, come within the general clause  
 v. "or other *person or persons*." But this clause is too  
 THE STATE. vague and loose to be the ground of a criminal prosecution. The statute 14 *Geo. II. c. 6.* providing against the stealing of *sheep or other cattle*, was held to extend to nothing but mere sheep; and it was found necessary to make another statute to protect bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs. 1 *Bl. Com.* 88.

2. Can this judgment be supported upon principles of the common law? Such an exhibition as is here set forth has never been deemed an offence by the common law of *England*. No precedent for such a prosecution can be found in the books. To speak of a *new* offence at common law is a solecism. If the conduct of *Knowles* was immoral in its tendency, it was an immorality not to be punished by human laws. But it may well be questioned, whether there was even an immorality in this exhibition. What was the thing exhibited? A real production of nature; a natural curiosity. There was no imposture, no juggling, no necromancy, no legerdemain. A young lady was lately seen in our principal towns without hands or feet. No one thought this exhibition criminal, or in the least degree immoral. This lady, to be sure, was *handsome*; but can the beauty or deformity of the object make any difference as to the point under consideration?

3. The information is ill for duplicity. It sets forth two distinct offences: First, that of exhibiting the *picture* at the corner of *Elm and College Streets*; and secondly, that of exhibiting the *monster* at the house of *Candee*. It is also ill, because it contains no sufficient description of the *show*. It only says, in general terms, that it was "a horrid and unnatural monster." It ought



to be so particularly described, that the court may see whether the exhibition of it was an offence, or not. June, 1808.

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*Ingersoll and N. Smith*, for the prosecution.

1. This is a statute offence. There was an exhibition of a public *show*, in a public house, for money. It called people together in a public place, and induced them to waste their time and money. It was within the words of the statute, and productive of all the evils which the statute was meant to guard against.

2. It is a common law offence. Whatever is against good morals; whatever strongly affects the feelings of mankind, and gives them offence, is punishable at common law. There is a sound *principle* to support the prosecution; from the peculiar nature of the case, precedents exactly in point are not to be expected.

3. The information is not double. The giving notice that there would be such an exhibition is no offence. But if that was a distinct offence, the information will not be bad after verdict; it could be so only on a special demurrer. If the party submits to go to trial on the general issue, he waives all exception as to form.

BY THE COURT, unanimously. The statute on which this information is grounded, prohibits all persons from exhibiting "on any public stage or place whatsoever, any games, tricks, plays, shows, tumbling, rope-dancing, puppet-shows, or feats of uncommon dexterity or agility of body," under a penalty. The word *shows*, which alone can apply to this case, has no technical meaning, known in law; and it cannot be extended by construction, to render criminal the mere exhibition of a work of art, a natural curiosity, or the collections of a museum.

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Every public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. The averment in this information, that it is contrary to the statute, may be rejected as surplusage, and will not vitiate. But such an information must particularly state the circumstances in which the indecency, barbarity or immorality, consists; that the court may judge whether the public exhibition of the show amounts to a crime.

This information alleges, that said *Knowles* exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen, or exposed as a show; but states no circumstances in the description of its appearance, which show this allegation to be true: it cannot be supported, either at common law, or on the statute.

Judgment reversed.

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GREGORY FOSDICK *against* THE NORWICH MARINE  
INSURANCE COMPANY.

CASE stated.

An interest in the vessel and cargo, gives an interest in the profits of the voyage, which may be the subject of insurance.

This was an action on a policy of insurance. The defendants pleaded *non assumpsit*. A verdict was found for the plaintiffs, for 6,502 dollars, subject to the opinion of the court, on the following case:

*A.* insured  
6,000 dollars,

as profits on a cargo, at and from *Bordeaux* to the *West Indies*. At the time of effecting the insurance, *A.* represented to the insurers, that he had received advice from his correspondent at *Bordeaux*, of the vessel's arrival there, and of the state of the market, and that it was expected a cargo would be obtained, worth from 20,000 to 25,000 dollars. The vessel actually sailed with a cargo worth but 9,251 dollars. Held, there was no misrepresentation.

In case of an insurance upon profits, and a total loss, no abandonment is necessary.

The plaintiffs assured, at the *Norwich Marine Insurance Company*, six thousand dollars, as profits on the cargo of the brig *Celia*, valued as insured, at and from *Bordeaux* to *St. Bartholomew* and *Guadaloupe*, or either of them; warranted against average or partial loss; and in case of total loss, proof that the property belonged to citizens of the *United States*, to be made in the *United States*. A policy was duly executed on the 22d day of *May*, 1804. At the time of effecting the insurance, the plaintiffs represented to the defendants that they had received advice from their correspondent, at *Bordeaux*, of the arrival of the *Celia* at that port, and of the state of the market; and that it was expected a cargo would be obtained, worth from 20,000 to 25,000 dollars. The plaintiffs shipped on board the *Celia*, at *Bordeaux*, a cargo of wine, oil, soap, and dry goods, valued at 9,251 dollars, being the avails of the outward cargo. The plaintiffs were citizens of the *United States*, owners of the vessel and cargo. The vessel was furnished with all the necessary papers and documents, for a neutral and *American* vessel, and sailed from *Bordeaux* on the first of *June*, 1804, for *St. Bartholomew* and *Guadaloupe*, *Bradford Taber*, a citizen of the *United States*, being master; and on her voyage was captured by his *Britannic* majesty's ship of war the *Hippomenes*, on the first day of *July* following; and on the same day carried into the island of *Antigua*; of which the plaintiffs gave notice, and made proof to the *Insurance Company* on the 26th day of *October*, 1804, and offered to the secretary of the company to abandon; to which the secretary replied, that he deemed no abandonment necessary; but if it should afterwards be found to be necessary, the abandonment should be considered as having been made at that time. The question for the opinion of the court is, whether the plaintiffs are entitled to recover? If so, the verdict to stand; if not, a nonsuit to be entered.

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*Robbins*, for the plaintiffs. This case presents three

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1. Whether the profits of the voyage were an insurable interest?

2. Whether the representation made at the time of effecting the insurance was false, so as to avoid the policy?

3. Whether there was a sufficient abandonment?

1. The only objection that can be raised against an insurance of this description, is, that profits, having no actual existence at the time of the insurance, and depending on a variety of contingent events, cannot be ascertained with any reasonable degree of certainty; and, therefore, such a contract, respecting them, must have the effect of a wager. Such a doubt can only arise by supposing a similarity between a contract of this nature, and an insurance of property *interest or no interest*, which is made void by the statute 19 *Geo. II. c. 37*. It may be allowed, that such an insurance would be held equally void here, as it would under this statute in *England*; because our laws lean most strongly against gambling transactions in any shape. But we apprehend that profits, in reasonable expectancy, form an interest which may well be insured, notwithstanding this statute, and notwithstanding our laws are decidedly opposed to every species of wagering contracts. The common law, indeed, goes much further to support insurances, than is necessary to our case; for it is now well settled, that before the statute of *Geo. II.* a person might have insured without interest. 8 *Term Rep.* 23. Since that statute, the practice of insuring on future profits has been continued; and is justified by the case of *Grant v. Parkinson*, which was an insurance on the profits of a

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cargo, valued at 1,000*l*. "without any other voucher than the policy." In this case, no doubt was entertained that the assured had a sufficient interest; though Lord *Manfield*, at first, thought that the words "without any other voucher than the policy," would bring it within the statute; but this opinion he afterwards changed, and judgment was given for the person insured. *Marsh.* 111. *Park*, 267. The same principle has been recognised in many subsequent cases; and very fully in *Barclay v. Cousins*, 2 *East*, 544.; and must be considered as establishing the doctrine that profits, *eo nomine*, are insurable. Here the court held, that though insurance is a contract to indemnify the insured, yet that indemnity is not to be considered as only for the loss of property which had been in actual possession; but might reasonably be extended to secure the avails of a voyage; as it is "not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune, be totally unproductive: and it is but playing with words to say, that in such case there is no loss, because there is no possession."<sup>(a)</sup> It will avail nothing to say, that in such case the interest of the insured cannot be proved, because the profits may be greater or less, or none at all, according to the existing state of the market; for, as in all cases of valued policies, it is sufficient to prove such an interest as shows merely that no evasion was intended, so where profits are insured, it is unnecessary to make actual proof, that in case of safe return, the insured would have realized profits to the full amount of the policy, but only that the particular circumstances of the case, or the general state of the market, would justify an expectation of profit to such an amount as would show the transaction not to be merely deceptive,

(a) See 2 *East*, 547.

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or entered into with a view to a fraudulent loss. *Lewis v. Rucker*, 2 Burr. 1167. Neither this idea, nor the principle that profits are insurable, is in the least opposed by the decision of *Hodgson v. Glover*, 6 East, 316. That case was directly within the statute; it being expressed that *no other proof of interest was to be required than the policy*. No question was made, as to the insurability of profits; on the contrary, the counsel for the defendant declared, that he did not mean to dispute, since the case of *Barclay v. Cousins*, that the profits of trade were insurable; so that the doctrine was explicitly assented to.

2. The next point is, as to the representation made by the plaintiffs. The objection is, that the plaintiffs obtained insurance to the amount of 6,000 dollars, by declaring that they expected to procure a cargo of much greater value than that which was actually received; and that it was impossible such profits could be realized on this last. The representation itself appears to have been precisely true, as it contained no assertion of facts, but made the defendants acquainted only with the information which the plaintiffs had received from their correspondent at *Bordeaux*. If this information finally proved to be incorrect, it is of no consequence; for the plaintiffs cannot be answerable for the false opinions or expectations of their correspondent. But the representation, whether true or false, was wholly immaterial to the risk, and could only affect the amount of interest. That the plaintiffs had such an interest in the ship and cargo as would afford good reason to expect *some* profit from the voyage is not to be denied. What the probable amount of profit would be, they could only judge from knowing the markets at *Bordeaux*, and the value and description of the return cargo. For this they must depend on the information of their correspondent. Such information on this subject as they had, they fairly sub-



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mitted to the insurers. If their calculation was extravagant, the defendants might have made a better for themselves. The whole transaction shows that it was an error of opinion, a disappointment of expectation, which is never evidence of a material misrepresentation. (a) The fairness of the transaction may be tested by a question similar to that put by Lord *Manfield* in the case of *Pawson v. Watson, Cowp.* 789. Did the expected value of the cargo induce the defendants to underwrite the policy? If it did, they would have said, put it into the policy; warrant that the ship shall leave *Bordeaux* with a cargo worth 25,000 dollars. "There is no fraud in it, because it is a representation only of what, in the then state of things, they thought would be the truth." The defendants here acquiesced in the plaintiff's belief, by not requiring other information, and a particular warranty, and so have assumed the risk of its correctness. But it does not appear that the calculation was ill founded; since, for the probable value of the return cargo they must trust to the information of their correspondent; and if this had proved to be correct, the sum insured could not have been unreasonable.

3. The remaining point is, respecting the abandonment. This is not essential, where there is an absolute destruction of the property insured. In such case, the insurer becomes immediately liable for the whole amount insured, without a formal abandonment; which would be but a vain ceremony when nothing is left to abandon. Here the *profits* of the voyage must be considered as totally destroyed by the capture and detention of the ship, so that a formal abandonment was not necessary. The insured need not, however, in any case, abandon, and claim for a total loss. If he do not abandon, he will only recover according to the loss actually

(a) *Marshall*, 336.

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sustained. There has, however, in this case, been an actual abandonment; for the secretary, to whom it was made, is the accredited agent of the company; or, at least, the organ of communication with the corporation. An abandonment to him is, therefore, sufficient.

*Dana and Goddard*, for the defendants.

1. It cannot be pretended that, because a wager contract of insurance may be said to have been good at common law, and to be void, in *England*, only under the statute of *Geo. II.*, therefore, such a contract may be supported in this state; for here no action can be maintained on any wagering contract, whether entered into by way of insurance, or in any other mode that may be devised; such contracts being wholly repugnant to the policy of our laws. The object of insurance is to indemnify the party insured against the hazard to which his property is exposed. It is apparent, that such a contract may be easily perverted to mischievous purposes. So, indeed, has been the fact; and much vigilance ought to be used to diminish the opportunities of abuse, or, at least, to prevent their increase. A powerful means of effecting this object is, to make the safety, rather than the loss of the property, conducive to the interest of the party insured. The abuses which arose from insurances without interest, gave occasion to the statute before mentioned; but if the design of this statute and the policy of our laws may be evaded by a substitution of different terms, or insuring a sum considerably beyond the value of the property, abuses may occur to such an extent as to render them unavailing. The objection to an insurance of profits is, that they have no actual existence; that they are only in expectancy, and may never be realized. So that there may be the same temptation to fraud which there is in insurances without interest. Cases, indeed, may exist, in which the

probability of profit, in case of safe arrival, is so strong as to constitute an interest which may afford a reasonable ground of insurance, as connected with the ship and cargo. Such was the case of *Grant v. Parkinson*, in which the plaintiff had made such a contract with the government as to exclude every contingency of market, and render the profits certain on the arrival of the ship. So, where the course of trade is well understood, and not liable to fluctuation, the calculation of profit may be reduced to a kind of certainty, as in the case of *Barclay v. Cousins*. But all this amounts only to an insurance of what the goods shall be worth on their arrival at the port of delivery, and is very different from an expectation of profit, depending on a constantly fluctuating market. The same is true of an insurance of freight, the amount of which is ascertained by the contract itself, and may be demanded of the freighter in virtue of the contract. In such cases, there is always a rule by which the loss may be computed on an open policy. But profits depending merely on the state of the market, if insurable at all, can be so only by a *valued* policy, which "will open a new door to the evasion of the statute 19 Geo. II." (a) The opinion of *Marshall* seems to be, clearly, that profits, *eo nomine*, are not insurable; the object of insurance being, as he observes, "not to make a positive gain, but to avert a possible loss." And no case can be found which goes the length of establishing the doctrine that loss arising from the state of the market merely, is a subject of insurance. In *Grant v. Parkinson*, the interest proved at the trial was the profit, to the amount of the sum insured. The insurance, however, was on the ship and cargo; property in actual existence; and the profits, as was said by Lord *Mansfield*, were "pretty certain," and were connected with the property insured. But this question

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June, 1808. has been settled, in *England*, in the late case of *Hodgson v. Glover*; which was an insurance on the profits of a voyage, valued at the sum insured, without further proof of interest than the policy. The objections were, that this last provision brought the case within the statute; and that there was no proof that profits would have been realized. Lord *Ellenborough* said, that "at all events the objection is decisive, that the plaintiff does not show that he has sustained a loss by the perils of the sea. He does not show that if there had been no shipwreck, and the slaves had all got to a market, any profits would have been produced. It should have been shown that but for the peril insured against, which happened, there would have been profit upon the adventure." Here it does not appear, that had the vessel arrived safely at her port of delivery in the *West Indies*, any profits would have been produced; therefore, upon the authority of *Hodgson v. Glover*, there can be no recovery. This case is of later date than that of *Barclay v. Cousins*, to which it is, in some degree, opposed. But even that cannot be said to have established the principle that profits, independently of the thing from which they are to arise, are insurable; or that, in case of an insurance on profits, there can be a recovery without proof of such a state of the market, as to afford "a pretty certain" expectation of profits; which is, at all events, indispensable.

2. Any misrepresentation of a fact material to enable the insurers to estimate the risk, is sufficient to avoid the policy.(a) This representation need not be wilfully made, with a preconceived design to deceive the insurer. For although the insured does not know the representation to be false, it will still be fatal, if it be material to enable the insured "to make his calculations, and ap-

(a) *Marshall*, 334, 355.

preciate the risk." On the representation of the party applying to be insured, two questions are always to be decided: shall insurance be made? and on what terms? These must depend upon the circumstances attending the particular case; not only the hazard of capture and shipwreck, but the probability there may be of want of due care in the master and mariners, and the temptation on the part of the insured to effect a fraudulent loss. This is a circumstance which, if known to the insurer, would always occasion an increase of premium, if not a refusal to assume the risk; for insurers will not calculate their policies so as to make it for the interest of the insured to act unfairly; but on the contrary, they would choose that the insured should be interested to promote the safety of the voyage, as this affords a security for attention and care. In this case, it may well be supposed, that had the insurers known, that instead of a cargo worth 25,000 dollars, the ship would have sailed with one worth but 9,000, they would not have taken a risk on the profits to the amount of 6,000 dollars, for the same premium. The information respecting the value of the cargo was, therefore, material; and although not known to be false, yet in fact being so, it is sufficient to vitiate the policy.

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3. An abandonment, in this case, was necessary, because there was not an absolute literal destruction of the ship and cargo; but a possibility remained of their recovery; (a) and of profit still arising from the voyage. The abandonment, however, which it is pretended was made in this case to the secretary of the company, is not sufficient. The insurers are an incorporated company, who act only by their president and directors; and the abandonment should have been made to them. If it is said that no abandonment is necessary, as there was

(a) *Park*, 82. 143. *Marshall*, *passim*. 1 *T. R.* 310. 613. 2 *Root*, 404

June, 1808. nothing to abandon, the same reason will overthrow the plaintiffs' right of action; because if there was nothing to abandon, there could have been nothing to insure.

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BY THE COURT. An interest in the vessel and cargo gives an interest in the profits of the voyage. Such an interest in the expected profits is an insurable interest.

The misrepresentation, or suppression, of material facts will vitiate a policy of insurance. But in the present case, the expectation of profits, and the facts on which that expectation was grounded, appear to have been truly stated. There was no misrepresentation.

An abandonment to the agent, is an abandonment to the insurers. But the capture of this vessel, under the circumstances of the case, amounted to a total loss of the profits insured, and no abandonment was necessary.

Judgment to be entered for the plaintiffs.

EBENEZER ROWLEY *against* SAMUEL YOUNG.

WRIT of error.

*A.* having a suit pending in court against *B.*, the parties mutually agreed, that it should be called out, and submitted to arbitration, and that the costs which had arisen, and should arise thereon, should follow the award. The arbitrators met, and *A.* attended; but *B.* revoked his submission. In an action on the case for such revocation, it was held that *A.* was entitled to recover as well the costs in the suit at law, as those under the submission; both of which, as stated in the declaration, amounting to more than seventy dollars, gave the superior court jurisdiction of the cause.

This was an action on the case, brought by *Young* against *Rowley*, alleging that the plaintiff had an action



of trespass upon the statute, for cutting trees, against the defendant, pending in the *superior court*, by appeal of the defendant from a judgment in favour of the plaintiff, for 60 dollars damages and costs; that it was mutually agreed by the parties that the action should be called out, and submitted to the arbitrament and final determination of *Asher Miller*, *Matthew Griswold*, and *Isaac Spencer*, esquires, and that the costs which had arisen, and should arise thereon, should be decided according to law, and upon the same principles as if the action had proceeded before, and been determined by, the court and jury; that it was also agreed, that a submission in writing to this effect should be drawn and executed by the parties, and that the arbitration should be held at some future convenient time, at a place specified; that soon afterwards, the plaintiff called out the arbitrators, who met at that place, and took upon themselves the burden of an award in the premises; that the plaintiff attended with his witnesses and counsel; and that the defendant then refused to sign any submission, and revoked the powers before given to the arbitrators, assigning no other reason than that the statute of limitations had run against the trespasses complained of. The declaration then stated that the costs which had arisen in the action at law amounted to 50 dollars, and those under the submission, including the arbitrators' fees, to forty-five dollars; and concluded by alleging damages to the amount of 200 dollars.

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The plaintiff obtained a verdict for fifty-six dollars, and costs. The defendant moved in arrest of judgment, for that, 1. So much of the declaration as related to the action of trespass in the *county court*, the appeal therefrom, and costs arisen thereon in the *superior court*, was insufficient; 2. The costs under the submission, including the arbitrators' fees, did not amount

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This motion was overruled, and judgment rendered for the plaintiff.

*E. Huntington and Gould, for the plaintiff in error.*

The general question, which arises in this case, is, whether the *superior court* had jurisdiction? In personal actions, the rule of damages, which determines the jurisdiction of the court, is derived from the statement of facts in the declaration, and is not given by the formal demand in the conclusion. To such rule of damages the court and jury are bound to adhere: a departure from it will be error. *Tyler v. Marsh*, 1 *Day*, 1. Now, if it appears from the declaration, that the jury cannot give more than seventy dollars, the *superior court* has not jurisdiction.

This is an action on the case for revoking a submission to arbitrament. The rule of damages must be the expenses to which the plaintiff was subjected by such revocation. The plaintiff has stated those expenses at forty-five dollars only. But it is said, that the costs in the antecedent suit make up the requisite amount. We contend, that such costs cannot be recovered in this action. This position, which, if well founded, makes an end of the case, is supported by *Wetmore v. Lyman*, in error, 2 *Root*, 484. That was an action on an arbitration note. The subject of the submission was a suit in the *superior court*, in favour of *Wetmore* against *Lyman*, which, at the time of submission, it was agreed should be called out. *Wetmore* afterwards revoked, and the suit proceeded to trial. The plaintiff in the action for the revocation offered to prove the loss of time and expenses, to which he was sub-

jected in the trial of the cause. The defendant objected to this evidence; but it was admitted by the *county court*; and a bill of exceptions being filed, a writ of error was brought in the *superior court*. The judgment was reversed, on the ground, that the plaintiff was entitled to recover damages only for the trouble and expense he had been put to in preparing for the arbitration; or, in other words, that the damages ought to be only such as were direct and immediate, arising from the submission and revocation.

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It may be objected, that special averments as to the particular items of cost accrued, are immaterial and impertinent, and may be rejected as surplusage: And that the jury, therefore, would be at liberty, on this declaration, to give more than seventy dollars for aught that appears; since more than that sum is demanded. We answer, that the rule holds only as to *impertinent*, i. e. *foreign* averments; not to those which are merely immaterial. The party declaring is bound by the latter, and they cannot be rejected, since they enter into the description of his cause of action. *Savage, q. t., v. Smith, 2 Bl. Rep. 1101. Bristow v. Wright et al. Doug. 665. Williamson v. Allison, 2 East, 446.* The averments in question, if unnecessary, are not impertinent; as they explain the manner in which, and the extent to which, the plaintiff has been damnified.

*Daggett and Hosmer, for the defendant in error.*

It is clear beyond a question, that the demand of the plaintiff before the *superior court*, to have conferred jurisdiction, must have surmounted seventy dollars. It is likewise undisputed, that two hundred dollars were demanded as damages. To counteract the force of this explicit demand, it becomes indispensably necessary to show, that the averments in the declaration were re-



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strictive of damages, and precluded the legal possibility of recovering more than seventy dollars. This has been attempted. It is averred, that the costs of the *superior court*, anterior to the submission, amounted to fifty dollars only, and those accruing under the submission, to forty-five dollars. The latter sum, it is admitted, was recoverable; but it is contended, that the former was not. The argument of the defendant below is to this effect. The damages to which the plaintiff is entitled are those, and only those, which result necessarily, or by direct consequence, from the act of revocation. But the only necessary and direct damages thus resulting, are the costs under the submission, that is, forty-five dollars. The minor proposition is denied; and on its validity depends this branch of the argument. It must be constantly remembered, and the defendant below seems to have forgotten, that the submission was made while the action was depending, and of the costs that had arisen. The revocation necessarily frustrated the recovery of the costs. The damage is inevitable, and derived exclusively from the revocation. The trespass is not affected by this act; this cause of action remains; and the law furnishes the means of vindicating it. Not so regarding the costs. The direct and necessary consequence of the revocation, then, was to utterly obstruct the recovery of the costs attending the action of trespass; and a damage was thereby constituted, which the present action alone can redress.

The same result will arise, when we view the subject in a light somewhat different. Every express contract, which does not contain a stipulated sum, is accompanied by this implied engagement, that the violator of it shall be subjected to the reasonable damages, derived from his unjustifiable act. But the reasonable damages attending the act of revocation above mentioned, comprise not only the costs under the submission, but those which

had arisen in court; and to recover which (with the damages) was the great inducement to the submission. He who denies that the costs of court are reasonable damages, must be prepared to legalize fraud, and varnish moral turpitude. For unquestionably it is fraudulent and dishonest, to induce the withdrawal of an action, on a promise to refer it to arbitration, and, having obtained this object, to refuse compliance with the assumption, and the payment of the existing costs. *Vide Domat on Interest and Damages*. The jurisdiction of the superior court, then, is established beyond all objection.

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If the costs of the court constituted no part of the damages, it is satisfactorily clear that the court below had jurisdiction. The argument against it proceeds exclusively on this ground, that the allegations relative to the costs under the submission are material averments, from which the proof may not be permitted to vary. But this cannot be admitted. On the contrary, they are not merely unnecessary, but impertinent, and to be regarded as surplusage. Their utter nullity in every view, will not be denied, if their impertinence is clearly established. What, then, is an impertinent averment? It is one foreign to the cause, and which may be struck out, without impairing the declaration. It is said by Justice *Lawrence*, "if the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action." *East*, 452. The above definition and remark are supported by all the cases on this subject. In *Bristow v. Wright*, *Doug.* 642., Lord *Manfield* observes, "that where the declaration contains impertinent matter foreign to the cause, and which the master, on reference to him, would strike out, that will be rejected by the court, and need not be proved. But if the very ground

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of the action is misstated, that will be fatal." The same principle is adopted in *Pepin v. Solomons*, 5 *Term Rep.* 496., and the application of it in the former case vindicated. Then follows the case of *Williamson v. Allison*, 2 *East*, 446. This was an action on the warranty of a quantity of claret; and it was needlessly superadded, that the warranty was made fraudulently and deceitfully. The fraud was not proved; but the warranty was past dispute. The contest was, whether the averment of the fraud might be considered as impertinent, and of this opinion was the whole court. "If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, (said Lord *Ellenborough*,) the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved." The principle, then, is this, that an averment in the declaration, which may be expunged without touching the gist of the action, is mere surplusage, and to be received as if it had no existence. What more rational than this? Had there been no rule on this subject, or one of an opposite tenor, it was, nevertheless, competent for the court to adopt that mode of practice, which best would facilitate and subserve the administration of justice. See *Robinson v. Bland*, 2 *Burr.* 1077.

This, then, is the simple point of inquiry, on which the argument depends; what is the specific character of the allegations relative to the costs under the submission? Were they necessary? It is not pretended. Were they proper, or usual, or compatible with clerical skill or correctness? The assertion, no person will dare to hazard. May they not be struck out without impairing the cause of action in the slightest degree possible? Unquestionably they may. Then, they are impertinent; and if so, they may be expunged by the court, or, according to the practice in such cases, passed over,



as if they had not existed. The basis of the argument we have combatted, being altogether imaginary, we trust the superstructure will be viewed as equally fallacious.

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BY THE COURT, SWIFT, TRUMBULL, SMITH and BALDWIN, Js. dissenting. The cost, which arose in prosecuting the action at law, before the submission, and the cost which arose after the submission, as claimed in this action, amount to a sufficient sum to bring this case within the jurisdiction of the *superior court*. And if the plaintiff can recover for both these claims, the decision was right.

It has been long settled, that the cost arising under the submission may be recovered in this form; and we are of opinion, that the claim for the antecedent cost rests on the same principle. The cost in both cases arose in preparing the case for trial, and must have followed the award. And whether it arose under the submission, or whilst the case was depending in court, and was sent to the arbitrators by the submission, cannot change the nature of the claim, or vary the injury done to the party by the revocation. It would be manifestly unjust, to allow a party to induce his opponent, under the faith of a submission, to give up his claim for cost before the court, and to incur a new expense, and then deprive him of this claim by a revocation.

Judgment affirmed.

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JEREMIAH BURDEN *against* ABRAHAM SKINNER.

In an action of covenant against a master, for sending his apprentice out of the country, parol evidence is admissible, on the plea of *not guilty*, to prove that the plaintiff consented to the act.

## MOTION for a new trial.

This was an action upon the covenants of an indenture, dated the 31st day of *March*, 1792; by which the plaintiff bound his son, *Jeremiah Burden*, jun. to the defendant and his wife, to serve them from the age of eight years until he should arrive to the age of twenty-one. The defendant, on his part, covenanted to teach the child to read, write, keep accounts, and also the art of husbandry. The declaration alleged, that the defendant did not teach the apprentice to read, write, and the art of husbandry, &c.; but in violation of his covenants, and contrary to the mind and will of the plaintiff, on or about the 1st of *April*, 1796, the defendant transported the said *Jeremiah Burden*, jun. beyond the seas, out of the territory and limits of this state, and the *United States*, to the *West Indies*, from whence he has never returned.

The defendant pleaded *not guilty*.

At the trial, the plaintiff founded his right of action, solely, upon the defendant's sending the apprentice to the *West Indies*. And the defendant offered a witness to prove, that before and at the time of sending the boy to the *West Indies*, the plaintiff consented, and agreed with the defendant thereto, and that the boy himself consented, and was desirous of going. To the admission of which testimony, the counsel for the plaintiff objected; and the court, before whom the issue was tried, ruled that the testimony was not admissible; and a verdict was found for the plaintiff. On motion for a new trial, the question, as to the admission of

this testimony, was reserved for the opinion of the nine judges. June, 1808.

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*Goodrich and Brace*, in support of the motion.

There can be but two objections: That parol testimony cannot be admitted at all; and that it cannot be admitted under this issue.

1. It is contended, that no parol testimony can be admitted. The evidence offered went to show that there was no breach of the covenant; nothing inconsistent with the duties of the master to the servant; nothing but what was approved by the father.

Had the boy gone home to spend the holidays with his parents, by the consent of his master, and at the request of his father, the father surely could not recover for a breach of the covenant.

If a sheriff takes a bond that one shall abide a faithful prisoner, and afterwards permits him to leave the prison, can the sheriff recover upon the bond? Or if one covenants to build a house, and finish it in a particular manner, and the plaintiff afterwards directs it to be finished in a different manner, can he then recover because his directions have been obeyed? And in this case, can the father claim to recover, for an act done by his own consent?

But this act is not inconsistent with the covenant. The defendant agrees to teach the boy certain things, and for this he has ample time. But for the sake of the health, or in compliance with the wishes, of the apprentice, he permits him to go to the *West Indies*, during this time. The act is usual in many parts of our country, and might have been absolutely necessary.



June, 1808. And if the act is not inconsistent with the terms of the covenant, evidence that the plaintiff consented to that act cannot impugn, or vary, the written contract.

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In *Ratcliff v. Pemberton*, 1 *Esp. Cas.* 35., which was an action of covenant on a charter party, for demurrage of the vessel; Lord *Kenyon* held, that the license and agreement of the plaintiff, to extend the time for discharging the cargo, was a legal defence, although the time was fixed by the covenant.

In the suit against *Barry*, cited by the chief justice, in *Little v. Holland*, 3 *Term Rep.* 592. the evidence was not admitted, because the parties had expressly contracted, that the license should be in writing, recognising the principle, that such a license would have been a defence, had not this particular stipulation been made. The plaintiff has also stated, in this declaration, that this act was contrary to his mind and will. He having made that allegation, we surely may be permitted to show that it is not true.

2. But the only real difficulty must be, whether this license or consent, can be given in evidence under the *general issue*.

It certainly is pertinent to this issue, because it goes to show that there is no breach of the covenant; that the defendant has done no wrong act; and is, therefore, *not guilty*. The consent of the plaintiff is not an act whereby the defendant is saved, or acquitted, from the plaintiff's demand; and which, therefore, must be pleaded; but it is an act which existed prior to any demand the plaintiff could have had, and in fact shows that he never could have had a demand. The acts referred to in our statute, (a) are acts which go to debar a recovery

(a) *Stat. Conn.* tit. 129. s. 4.

for a claim once constituting a good cause of action. June, 1808.  
 Thus, accord and satisfaction must be pleaded, as it  
 admits a pre-existing claim; but a license to cut timber  
 need not be pleaded to an action of trespass, because it  
 shows that the party was not a trespasser. In *Littler*  
*v. Holland*, the evidence was not admitted, because it  
 did not comport with the facts stated in the declaration.

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But even if this ought to have been pleaded, as this is a motion for a new trial, intended to bring up the whole case, not subject to the technical niceties of bills of exceptions, the court will see that substantial justice is done.

*Ingersoll*, contra.

The great question is, whether the defendant can prove by *parol*, that the plaintiff consented to the act done by the defendant. The general rule, that parol evidence is not to control a covenant, or any written contract, is not denied. If there had been a parol agreement *at the time* of entering into this covenant, similar to that claimed to have been afterwards made, it surely could not have been admitted to vary the covenant. Can it, then, make any difference, that it was made at a subsequent time? If one gives a note payable in sixty days, and the payee afterwards agrees by parol to wait sixty days longer, this agreement will not be admitted in evidence any sooner than if it had been made at the time the note was given. No parol agreement made *at any time*, as to the subject matter of a written contract, may be proved.

*Littler v. Holland*, 3 Term Rep. 590., was an action of covenant, by the terms of which, the plaintiff undertook to build two houses for the defendant, by the 1st of April, 1788; and the defendant to pay 500*l.*, alleging

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that they were built according to agreement, and that the defendant had not paid. It appeared, that the houses were not built at that time; but that the parties, by a subsequent parol agreement, had enlarged the time. Justice *Heath* refused to permit the plaintiff to prove this fact; and Lord *Kenyon* thought the case so clear, that he refused a rule to show cause why a new trial should not be granted. In *Barry's* case, it does not appear whether this point was considered, as there was another sufficient objection.

As to the opinion given by Lord *Kenyon*, in *Ratcliff v. Pemberton*, so far as it respects the license being a defence, it was not a point before him; and was therefore a mere *obiter dictum*. But upon the other point, (*viz.*) that the fact ought to have been specially pleaded, that case is directly in point. Although our statute permits almost every thing to be given in evidence under the general issue; yet it expressly excepts "a discharge from the plaintiff, or his accord, or some other special matter, whereby the defendant, by the act of the plaintiff, is *saved* or *acquitted* from the plaintiff's demand in the declaration." Tit. 129. s. 4.

Here, the defence rests solely upon the *act* of the *plaintiff*, by which the defendant attempts to shelter himself from the demand. It is, therefore, exactly within the statute. And as this motion is for a new trial for excluding evidence, and not for misleading, it cannot prevail, if the evidence ought not to have been admitted upon the issue joined.

BY THE COURT, REEVE and EDMOND, Js. dissenting. A parol agreement cannot be given in evidence to discharge a breach of a written contract; but it may be given in evidence to show that there never was a breach. In this case, the evidence offered would serve



to show, that in consequence of the license and consent of the father, there never was a breach; and is, therefore, proper and pertinent to the issue, and ought to have been admitted.

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New trial to be granted.

ABEL KNAPP *against* EZRA LOCKWOOD.

MOTION for a new trial.

This was an action of trover for a promissory note. The conversion was laid on the 21st of *June*, 1806; and the suit was brought in *November*, 1806.

The defendant pleaded *not guilty*; and on the trial, the defence was, that he took the note in question, with the rest of the plaintiff's property, as agent of the selectmen of the town of *Stamford*, by virtue of the statute authorizing the selectmen to take into their care and custody the persons and property of such as by idleness, mismanagement or bad husbandry, are likely to be reduced to want. Tit. 88. c. 1.

The plaintiff attempted to meet this defence, by showing that the selectmen, in their proceedings, had not conformed to the provisions of the statute referred to; and that, therefore, they had no right to retain the plaintiff's property.

To give a just statement of the case, it will be requisite to the provisions of the 12th section, it was held, that they could not retain such property, and that the owner, after demand and refusal, was entitled to recover against them in trover.

The statute tit. 88. c. 1. authorizing the selectmen to take into their care and custody the persons and property of persons likely to be reduced to want, by idleness, mismanagement, or bad husbandry, must have a strict construction, and be strictly pursued. Therefore, where the selectmen, having taken the property of a person of that description, neglected to set up a certificate of their doings, and to make and lodge in the town-clerk's office an inventory of the property taken, pur-

June, 1808. *quisite to recite three or four sections of the statute,*  
*KNAPP* *and then to state the proceedings of the selectmen*  
*v.* *under it.*  
*LOCKWOOD.*

*Sect. 8.* provides, "That the selectmen for the time being, in the several towns in this state, shall, from time to time, diligently inspect into the affairs and management of all persons in their town, whether householders, or others; and if they shall find any person or persons that are reduced, or are likely to be reduced to want, by idleness, mismanagement, or bad husbandry, that then such selectmen may appoint an overseer to advise, direct and order such person in the management of his business, for such time or times as they shall think proper: a certificate of which appointment the selectmen shall forthwith set upon the sign-post, and lodge a copy thereof in the town clerk's office of said town; and thereupon no such person, while under such appointment, shall be able to make any bargain or contract, without the consent of such overseer, that shall be binding, or valid in law.

*Sect. 9.* "And if such measures do not prove sufficient to reform such person, then the selectmen (or without first appointing such overseer, if they judge it necessary, or more proper) may, and they are hereby directed to make application to the next assistant or justice of the peace, and inform him thereof; which assistant or justice is hereby directed and empowered, at the request of the selectmen, to issue forth his warrant to the sheriff, his deputy, or to either of the constables of that town, commanding them to take the body of such person, and bring him before the said authority, in order that such person may be examined concerning his idleness, mismanagement, and bad husbandry, and be dealt with according to this act.

*Sect. 10.* "And in case such person, who shall be so informed against, shall abscond, so that he cannot be taken bodily, then the officer shall serve such warrant, by leaving a true and attested copy thereof at the usual, or last place of his abode; and thereupon, after the proceedings above directed be had, the selectmen, or the major part of them, if no sufficient reason be offered to the contrary, shall, by and with the advice of said assistant or justice, and they having such advice, are hereby authorized, and fully empowered to take such person and his family (if any he hath) into, and under their care; and such person and family to assign, bind, and dispose of in service, as they shall judge best.

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*Sect. 11.* "And when the selectmen shall have thus taken into their care any such person, and disposed of him as aforesaid, or in case of his absconding as aforesaid, if informed and proceeded against as aforesaid, the selectmen for the time being are hereby authorized and fully empowered, by and with the advice of the said assistant or justice, to take into their hands and custody, all the lands, goods, chattels and credits of any such person, and the same to dispose of, improve and manage by themselves, or any under them, for the best good and advantage of such person, or his heirs.

*Sect. 12.* "And the selectmen shall make evident and certain their doings with, and on such estate as they shall take as aforesaid, by forthwith setting up a certificate thereof in writing, under the hands of said authority and selectmen, on the sign post, or some other public place in said town; and shall also lodge a copy thereof in the town clerk's office of said town; and also within ten days after the taking of such estate into their hands, make a true and perfect inventory of all and singular the goods, chattels and credits of such person, as shall come into their hands, with a just estimate of



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 KNAPP ment of two indifferent freeholders, under oath ; being  
 V. thereunto appointed and sworn by said authority: which  
 LOCKWOOD. inventory so taken, shall be lodged in the town clerk's  
 office of that town."

The proceedings produced in evidence by the defend-  
 ant, were, 1. A complaint by the selectmen to *Ebenezer*  
*Davenport*, Esq. a justice of the peace ; 2. A warrant to  
 apprehend the plaintiff, and bring him before the jus-  
 tice, to answer to the complaint ; 3. The judgment of the  
 justice, finding the plaintiff guilty, and advising the se-  
 lectmen to take him and his family under their care,  
 and also to take into their hands and custody all his  
 lands, goods, chattels and credits, to be by them dis-  
 posed of, improved and managed, to the best good and  
 advantage of the plaintiff, or his heirs, agreeably to the  
 statute ; 4. An appointment by the selectmen of the de-  
 fendant as agent. This appointment was as follows:  
 " Whereas the selectmen of the town of *Stamford*, with  
 the advice of the civil authority of the same, have  
 thought proper to take into their care the person and  
 family of *Abel Knapp*, of said *Stamford*, together with  
 the goods, chattels, lands, &c. belonging to said *Abel*,  
 by virtue of the 9th section of a certain statute law of  
 this state, entitled ' An act for relieving and ordering  
 of idiots, impotent, distracted and idle persons: ' We,  
 the selectmen of said *Stamford*, have thought proper to  
 appoint, and do hereby appoint *Ezra Lockwood* of said  
*Stamford*, agent, to take into his care said *Abel Knapp*,  
 his family, and estate, to manage for the best good and  
 advantage of said *Abel*, and his heirs. *Stamford*, Decem-  
 ber, 13th, 1804." [Signed.] This appointment was con-  
 tinued, by a writing in these words: " *Stamford*, March  
 19th, 1806. We the subscribers do continue the appoint-  
 ment of *Ezra Lockwood* as agent over *Abel Knapp*, and

to take charge of said *Abel*, his property and family." June, 1808.  
 [Signed by the selectmen.]

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The complaint, warrant, judgment and appointment, which have been stated, was all the evidence adduced by the defendant, in justification of his detention of the plaintiff's property. The presiding judge, in giving his charge to the jury, instructed them, that the court were of opinion, that it was not necessary, in order to justify the defendant in detaining the property, that the selectmen should have taken, assigned, bound or disposed of in service, the person of the plaintiff, or his family; nor that they should have set upon the sign post in *Stamford*, or some other public place in the town, a certificate of their doings in writing, under the hands of the authority and selectmen; nor that they should have lodged a copy of such certificate with the town clerk; nor that an inventory should have been taken; but that the only facts which the jury had to find, were, whether the selectmen had, in fact, taken the plaintiff's property into their possession, in pursuance of the proceedings which had been had, and given in evidence; and whether the defendant was their agent; and if so, they must find a verdict for the defendant. The jury found for the defendant accordingly; and the plaintiff moved for a new trial, on the ground of a misdirection; which motion was reserved for the opinion of the nine judges.

*Ingersoll* and *N. Smith*, in support of the motion.

1. It does not appear from the certificate of the selectmen, that they ever took the person, family or property of *Knapp* into their possession, as they only say, they *have thought proper* to take into their care, &c. To think proper to do a thing, is not doing it.

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2. The reappointment of the agent in *March*, 1806, being more than one year from the time of the first appointment, and without any new application to the justice, was void.

3. It was necessary, before the selectmen took the property of *Knapp* into their custody, to assign him in service.

4. As the selectmen did not set up a certificate of their doings on the sign post in *Stamford*, nor in any other public place in that town, nor lodge a copy of such certificate with the town clerk, and leave, at his office, within ten days, an inventory of the property, they are accountable to the plaintiff for the property; and, of course, the defendant's authority under them fails.

*Gould*, contra.

1. The certificate of the selectmen is positive and explicit as to the fact, which it was introduced to establish, *viz.* the appointment of *Lockwood* as agent. It was not introduced to show that the selectmen took the person, family, and property of *Knapp*, into their care.

2. It is of no consequence, whether the reappointment of the agent in *March*, 1806, was more than a year after his first appointment, or not. It will not be denied, that the judgment of the justice may remain in force more than one year; and admitting, that the selectmen cannot appoint an agent for more than one year, yet the reappointment in question was within a year from the commencement of the suit.

3. It was not necessary that *Knapp* should have been literally assigned in service. The statute must have a liberal construction in favour of personal liberty. The



age, health and circumstances of the person proceeded against, are to be regarded.

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4. As to the *notice* and *inventory*, it is to be observed, that they are not made *conditions*, on which the defendant's right depends. The statute directs the notice to be given for the information of third persons; and the inventory to be made only as evidence to ascertain the extent of the defendant's liability in accounting. Both the notice and inventory are to take place after the appointment of the agent, and after his right to take the property has accrued.

BY THE COURT, REEVE, EDMOND and GRISWOLD, Js. dissenting. The proceedings of the selectmen under the 9th section of the statute, were regular: And although they did not, under the 10th section, actually bind *Knapp*, or assign him in service, yet they had him before themselves, and the justice; and they disposed of him as they judged best, and most prudent; which was a virtual compliance with that part of the statute. They, thereupon, had a right to take possession of the estate. But as that statute is in derogation of common right, it must have a strict construction, and be strictly pursued. A right to take is one thing, and a right to retain, another. Although an officer, with a lawful writ of attachment, or execution, rightfully takes property, yet if he neglects to pursue the steps pointed out by law, his withholding is unlawful, and he becomes a trespasser.

The provisions of the 12th section of the statute are for the safety and security of the citizens; and the right of the selectmen to hold the property, depends entirely on a compliance with them. These provisions are, that the selectmen shall forthwith set up a certificate of their doings, in writing, under their hands, and that of

June, 1808. the authority, on the sign post, or some other public place in the town; and also lodge a copy thereof in the town clerk's office; and also, within ten days, make an inventory of the estate, with a just estimate of the value thereof, by appraisement of freeholders, under oath, and the same lodge in the town clerk's office.

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New trial to be granted.

MEDAD HOTCHKISS *against* JOHN NICHOLS.

A decree in chancery finding an immaterial fact is not admissible, in a subsequent suit at law between the same parties, to prove such fact.

MOTION for a new trial.

This was an action, *qui tam*, brought on the statute to prevent frauds, quarrels, and disturbances in bargains, sales, leases, or other alienations of lands. (a) The plaintiff declared, that on or about the first day of *November*, 1800, he became the sole and exclusive owner of an undivided moiety of a certain grist-mill, and the appurtenances, in *Woodbridge*; which moiety was before that time the property of *Lois*, wife of *James Downey*: that on the day before mentioned, he entered upon the premises, and took to himself the exclusive possession thereof, holding out therefrom all others, particularly *Downey* and his wife, claiming the premises as his own estate: that, at *Waterbury*, on the 14th day of *February*, 1802, the plaintiff being then in possession of the premises, and *Downey* and his wife, and the defendant dis-seised and ousted thereof, by the plaintiff's entry and possession; the defendant, contrary to the provisions of the statute, took and received a conveyance of the aforesaid moiety of the mill and appurtenances from the said *James Downey* and *Lois* his wife, to him, the defendant, *he then*

(a) *Stat. Conn.* tit. 97. c. 17.

*well knowing* that *Downey* and his wife were ousted of the possession of the premises, by the entry and possession of the plaintiff: and that the plaintiff then and there possessed, held, and claimed the same as his own estate in fee, exclusively of all others: and that, on the 15th day of *February*, 1802, the plaintiff being still in possession, the defendant caused the aforesaid deed of conveyance to be recorded in the records of the town of *Woodbridge*; and by virtue thereof, the plaintiff has ever since claimed title to himself in the premises.

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The defendant pleaded *not guilty*; and a verdict was found for the plaintiff. A motion for a new trial was then made, on the following grounds:

1. Because the plaintiff, on trial of the cause, offered in evidence to the jury, to prove that he was in possession of the premises, holding adversely, and that *this was known by the defendant* at the time when he took the deed complained of, a certain decree in chancery, made by the *superior court*, in a cause wherein *Medad Hotchkiss* was plaintiff, and *John Nichols, James S. Downey* and his wife *Lois*, were defendants; which decree was admitted by the court, as evidence to prove the facts aforesaid; and is as follows, viz.

*"Superior Court, July Term, 1804.*

*"Upon the petition of Medad Hotchkiss of Woodbridge, in New-Haven county, showing, that on the first of November, 1800, the petitioner was the owner in fee of one quarter of a grist-mill, in Woodbridge, on Beacon-Hill brook, called the Straits Mill, with all the privileges thereto appertaining. That Samuel Osborne was the owner of one other quarter; and that Lois, the wife of James S. Downey, then of Woodbridge, was owner of the remaining half. That previous to the first day of*



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*November*, 1800, the before-mentioned owners procured important and extensive repairs to be made upon the mill, mill-dam and appurtenances, to the amount of more than one thousand dollars. That the said *James* and *Lois* were unable to defray their proportion of the expense of such repairs; and that, at their request, the same was paid by the petitioner, to the amount of about four hundred dollars; and in consideration thereof, on or about the first day of *November*, 1800, the petitioner, and the said *Lois* and *James*, mutually covenanted and agreed, that for the consideration of five hundred dollars, to be paid in manner as was then stipulated, the said *James* and *Lois* would convey by a good and sufficient deed, their half of the aforesaid mill, with the privileges and appurtenances, to the petitioner. And that, from the sum of five hundred dollars should be deducted the sum advanced by the petitioner, for repairs, on their account; and the remainder, if any, as stated in the bill. That in pursuance of this contract, the said *Lois* and *James* delivered possession of the mill and appurtenances to the petitioner, for him to use, occupy and improve as his own; and to receive all the rents and profits from and after the aforesaid first day of *November*, 1800. That in pursuance of the contract, he took possession of the moiety of the mill, and has ever since used the same, receiving the profits, by their consent; and has made extensive repairs, at his own cost, in expectation of the fulfilment of the contract on the part of *Downey*. That the petitioner has ever been ready to receive the deed, according to the terms of the contract; and on or about the first day of *February*, 1802, and at other times, requested *Downey* and his wife to fulfil the contract. That on or about the 14th day of *February* last, *John Nichols*, of *Waterbury*, in *New-Haven* county, well knowing all the facts aforesaid, and contriving and intending to defraud the petitioner, and make gain to himself, applied to the said *James* and

*Lois*, and persuaded them to refuse to execute their contract with the petitioner, and to convey their half of the mill and appurtenances to him the said *Nichols*; and on the same 14th day of *February*, the said *James* and *Lois* did execute a deed of the same to the said *Nichols*, by force of which he has ever since claimed, and still claims, the same, and threatens suits therefore. That the petitioner has ever been ready to fulfil the contract on his part. That he has never received payment of the sums advanced by him, as aforesaid, but the same are now wholly due; and the said *James* and *Lois* are insolvent, and unable to pay the same. And that the value of the aforesaid moiety of the mill was, and now is, five hundred dollars; praying for relief," &c.

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*Downey* and his wife were defaulted. *Nichols* pleaded, that the facts set forth in the petition were not true. The court found that those facts *were true*; and that, during the pendency of the petition, *Downey* and his wife, in pursuance of their contract, made, executed and delivered to the petitioner, a conveyance of their moiety of the mill and appurtenances, and settled the account stated in the petition. Upon which *Nichols* was enjoined against using the deed of *Downey* and his wife to him, in support of his claim to the mill, under a penalty of two thousand dollars.

The court charged the jury, that this decree was conclusive evidence of all the facts therein adjudicated between *Hotchkiss* and *Nichols*; particularly, that at the time *Nichols* took the deed from *Downey* and his wife, *Hotchkiss* was in possession, claiming title; and that this was known by *Nichols*.

Rule to show cause why a new trial should not be granted was obtained; and the question reserved to be argued before the nine judges.

June, 1808. *Ingersoll* and *Staples*, in support of the motion, con-  
 HOTCHKISS tended, that the decree was not admissible evidence;  
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1. Because the decree and the suit at law were not between the same parties. *Buller's N. P.* 232. *Peake's Ev.* 68. *Gilb.* 24, 25.

2. The state is a party to the suit; and a part of the penalty recovered goes to the benefit of the state. The action, therefore, stands on the same ground with a criminal prosecution; but a verdict, or decree, in a civil action, is never given in evidence in a criminal case.

3. The facts found by the decree ought to be *material* and necessary to support the decree, in order that this may be given in evidence in another suit. That *Nichols* knew that *Hotchkiss* was in possession of the land, was not essential to support the decree. But it is absolutely necessary, that this fact should be proved, in order to subject the defendant in this suit.

*Daggett* and *Nathan Smith*, contra.

1. The parties to the *decree* and this suit, are virtually the same. *Downey* and wife, though made parties to the bill, were yet not parties to the decree; having complied with the demands of the petition before judgment.

Though the name of the state is used in connection with that of *Medad Hotchkiss*, he alone is the effective party. He can control the suit; his confessions may be admitted as evidence; and he, alone, is liable for costs.

The reason why a verdict may not be given in evidence against one who was not a party, is, that he had no opportunity to controvert the facts, on which it was



founded. This reason is not applicable to the present case; for *Nichols* was a party to the bill in chancery, and to the decree.

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2. The facts of *Hotchkiss's* possession, and of the knowledge of *Nichols*, were put in issue by the defendant's plea to the bill, and found by the decree. *Whately v. Menheim*, 2 *Esp.* 608. *Autram v. Morewood*, 3 *East*, 346.

3. The decree, if admissible, is conclusive as to the facts found. *Peake*, 34. *Esp. Dig.* 758. And it is no objection, in this case, that a part of the penalty to be recovered, is for the benefit of the public. *Atcheson v. Everitt*, *Cowp.* 382.

BY THE COURT. The question in this case is, whether the decree in chancery is conclusive evidence of the fact, that *Nichols* knew, at the time of taking the deed from *Downey* and his wife, that *Hotchkiss* was in possession of the land?

On examining the decree, it appears that the fact, to prove which the decree was offered, and which appears, in the terms of the decree, to have been found by the court, was not material in that case; and, although found, cannot be considered as put in issue on the bill in chancery.

Without determining, therefore, whether the decree of a court of chancery is evidence of the material facts found by the decree, in a suit between the same parties, regarding other rights; or whether such decree can be evidence of such facts, in an action for a penalty, it is sufficient to say, that this decree could not be evidence, in this case, for the purpose for which it was admitted. The court, therefore, advise a new trial.

New trial to be granted.

June, 1808.

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JAMES PHELPS *against* ABIGAIL ELLSWORTH, Widow,  
and MARTIN ELLSWORTH and others, Heirs of the late  
OLIVER ELLSWORTH, Esq.

A writ of error cannot be brought by one only of several respondents to a bill in chancery, against whom a decree has been passed; but all must join.

ERROR to reverse a decree of the *superior court*, on a bill in which the Hon. *Oliver Ellsworth* was plaintiff, and *James Phelps* and others, respondents.

The defendants in error pleaded in abatement, that *Chauncey Goodrich*, *Esther Eno*, *Hezekiah Eno* and *Elijah Griswold*, were parties to the petition, decree and record, complained of; and that this writ was brought by *James Phelps* only.

The plaintiffs in error demurred.

*Goodrich*, for the defendants in error.

*Ingersoll* and *Edwards*, for plaintiff in error.

By THE COURT, unanimously. The plea in abatement is sufficient.

Writ of error abated.

June, 1809.

STILES NICHOLS *against* EDEN RUGGLES and EDWARD  
M. HOLLY.

## MOTION for a new trial.

This was an action of book debt; and among other charges in the plaintiff's account, there was one of 262 dollars and 9 cents, for printing part of a book entitled "*The Federal Calculator*." It was proved, and admitted by the parties, that before *June*, 1804, when the printing was done, one *Daniel Hawley* had obtained the exclusive copyright of the book, as author, throughout the *United States*. He had lodged the title with the clerk of the district court for *Connecticut*, as the law directs; and had assigned his copyright to one *Pennyman*, with the exclusive privilege of printing and vending the book in this state. Since that time, the plaintiff had printed the same book in *Danbury*, in this state, for which printing, the charge above mentioned was made. There was no evidence that *Hawley* had ever published in any of the papers of the *United States*, that he had obtained the copyright; nor, that he had ever deposited a copy of the book in the office of the secretary of state of the *United States*. The controverted facts in the case were, that the plaintiff, before he did the printing, knew that the copyright had been secured by *Hawley*, and assigned to *Pennyman*; and that, though the printing was done in *Connecticut*, it was with a view only for the defendants to vend the copies in *New-Jersey*. The presiding judge, in charging the jury, instructed them, that it was the opinion of the court, that if they found that the plaintiff had such knowledge, the contract was illegal, and no recovery could be had for that charge.

A contract to reprint any literary work in violation of a copyright secured to a third person, is void; and the printer who executes such contract, with a knowledge of the rights of such third person, can recover nothing for his labour.

The provisions of the act of congress requiring the author or proprietor to publish the title of his book in a newspaper, and to transmit a copy of the work itself to the secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright.



June, 1808. The jury found a verdict for the defendant; and the plaintiff moved for a new trial, on the ground of a misdirection. This motion was reserved for the opinion of the nine judges.

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Previous to the argument, it was suggested by the counsel for the defendants, that *Hawley*, under whom *Pennyman* claimed, had secured the copyright of the work in question, previous to the year 1802, so that, in this case, no question could arise under the act of congress made in that year, and to take effect *January 1st*, 1803.; vol. 6. 114. a fact, which, though it did not appear upon the statement in the motion, would appear from the minutes of the judges who sat on the trial of this case at the circuit; to which, Judges *Reeve*, *Edmond*, and *Griswold* assented.

*Edwards* and *J. Law*, in support of the motion.

1. The first ground on which this motion for a new trial is founded, is, that for the printing *Nichols* ought to have recovered of *Ruggles* and *Holly*, who employed him, though it be admitted that the copyright was in *Pennyman*, and that in executing the printing, *Nichols* might have made himself liable to *Pennyman*. There must be something *immoral* in an act, in order to render it an illegal consideration for the support of a contract. The reasons why an undertaking against law is void, are, first, because the mind cannot be supposed to have given its free consent to act against duty; secondly, because the law will not permit the performance of that which it has forbidden; nor, consequently, allow the contractor to require that performance. *Pow. Con.* 165. The immorality of the act constituting the consideration, is expressly the first reason why the contract is void, and upon examination it will be found, that the second will in no instance hold, except where the breach

of the law, against which the act is committed, involves in it some immorality. There are a variety of positive laws, respecting which, it is said by *Blackstone*, that "the alternative is offered to every man, either to abstain from this, or submit to such a penalty;" and the same author observes, that "conscience is no farther concerned than by directing a submission to the penalty." 1 *Bl. Com.* 58. Not burying the dead in woollen, and not performing statute work on the public road, &c. are contrary to the law of *England*; yet "conscience," says the author before cited, is only concerned to submit to the penalty, if levied. Will it be contended, that no act done in contravention of such laws can furnish a legal consideration for a contract? Suppose that a man, instead of working on the public roads, should perform some important business for an employer; could he be denied all possibility of recovery for his services? We contend to the contrary, and insist, that contracts which may involve a disobedience to such laws, are, notwithstanding, legal and binding; for that, the reasons do not exist, for which certain contracts are pronounced illegal. There is, in such cases, no breach of duty, nor does the law, by any prohibition of the act, take away the power of the contractor to fulfil his agreement. The prohibition is not absolute, but only *sub modo*. Abstain from this, or submit to the penalty, is the alternative offered by the law. And in case of contracts made under such circumstances, whoever is to do that which the law has thus conditionally prohibited, must be supposed to have voluntarily submitted himself to the penalty.

In the present case, admitting that *Pennyman* had done all that was necessary, in order to secure the copyright to himself, we contend, that the law which secures to him the exclusive privilege of printing and vending, at the same time offers to every man the alternative of

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abstaining from infringing that privilege, or of submitting to the penalty prescribed. *Nichols*, the printer, had in this case, to make his election, whether he would forbear to print, or subject himself to the penalty. There is nothing in the printing *malum in se*, nor is there in it any breach of law, in which the conscience is concerned; therefore, the undertaking to print, and the undertaking to pay, are binding upon the parties. The penalty prescribed by the law on this subject, is the only guard which was intended to be given for the security of authors and their assignees; nor does sound policy require any other. *Nichols*, therefore, having elected to print for *Ruggles* and *Holly*, and to incur the risk of the penalty which might be recovered by *Pennyman*, did, having executed the printing for his employers, thereby acquire an equitable and legal right to recover for his services.

2. The present motion, therefore, is grounded on the fact, that *Hawley* had not complied with the requisites of the statute, having omitted to give notice in some public newspaper, that he had purchased the copyright. This notice, given in one or more papers in the *United States*, is, as we contend, a condition, without a compliance with which, no exclusive privilege can be claimed. It does not appear that *Hawley* has complied with this condition; therefore, neither he, nor *Pennyman*, his assignee, is vested with the exclusive right of printing and vending the book in question.

3. It does not appear, that either *Hawley* or *Pennyman* are citizens of, or residents in, the *United States*; and by the statute, citizens or residents only can be entitled to the privileges therein prescribed.

4. Though the plaintiff knew of the assignment to *Pennyman*, and that *Hawley* had obtained the copyright,



it does not follow, that *Nichols* might not have had license from *Pennyman* to print; nor, that there might not have been a second assignment, either to *Nichols*, or some other person, from whom license might have been obtained.

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5. *Nichols* was employed by persons who owned the copyright for the state of *New-Jersey*, and the copies were there to be disposed of. The printing, under such circumstances, was not any infringement of *Pennyman's* privilege.

6. It is by statute made the duty of him who obtains a copyright, to lodge a copy of the work with the secretary of state for the *United States*, though not expressly made a condition *sine qua non*. How is a compliance with that duty to be enforced, unless by making the security of his privilege depend upon the performance of it?

7. *Nichols*, to be barred of a recovery, should have known that the printing was unlawful. He might well suppose that he had a right to print for *Ruggles* and *Holly*, when the copies were to be sold in *New-Jersey*. He may be considered in the light of an officer, who has taken goods, which were pointed out to him, on a promise of indemnification. The promise to indemnify is binding, though the taking of the goods may have been unlawful. 1 *Pow. Con.* 178.

*Gould* and *Hatch*, contra.

The question, which arises upon this motion is, whether the contract between *Nichols* and the defendants is an undertaking illegal in such a sense as to render it void. We insist, that the printing was at the same time a civil injury, and a public offence; a civil injury, as being an infringement of the pro-

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**RUGELES.** prior's copyright, and a public offence, as incurring the forfeitures of the act of congress "for the encouragement of learning," &c. (*Vide Laws of U. S. A.* vol. 1. p. 118.) If it be either a private wrong, or a crime, the contract of which it is the consideration is void.

The general rule of law, that an engagement to do a thing in itself unlawful binds not, will not be questioned. *Pow. Con.* 164. 1 *Esp. Dig.* 88. So, if the consideration, upon which a promise is made, be unlawful, the promise itself is void, although it be for the performance of an act perfectly indifferent. *Pow. Con.* 176.; *Buller's N. P.* 206. As in the case of *Webb v. Bishop*, where two boxed for a wager of five guineas, and on *assumpsit* brought by the winner for that sum, the action was held not to lie, the consideration of the promise being a breach of the peace. *Esp. Dig.* 88. It is, then, a correct rule, that where the undertaking is upon an unlawful consideration, or for the performance of a thing unlawful, the contract is void. And it makes no difference, whether the act to be done be *malum in se*, or only *malum prohibitum*. *Pow. Con.* 165., and cases there cited. *Ketchum v. Scribner*, 1 *Root*, 95. So, that there is no foundation for the position assumed by the counsel in support of the motion, that in order to render an agreement illegal, the act stipulated for must be immoral in itself.

It is argued, however, that one may lawfully undertake for the performance of an act which amounts merely to a private wrong, and that such performance may be a good consideration to support an *assumpsit*. But it is the *unlawfulness* of the thing to be done, rather than its *criminality* in legal consideration, that takes away the obligation to performance. 1 *Pow. Con.* 164.

Every act, which is prohibited by law, is unlawful, whether it be a public wrong, or merely a civil injury.

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*Powell* adds elsewhere, that "if a man will take a bond, or other security, to be saved harmless of suffering one to escape, &c., or, if he do such a trespass, these contracts, upon the same principle, will be void." *Pow. Con.* 197. Here a contract to procure the commission of a private wrong is placed on the same footing as one to induce the perpetration of a public offence.

There is, besides, one entire class of cases, in which the principle for which we contend is fully recognised, viz. cases of contracts, or agreements in fraud of third persons: those are void, both at law and in equity. A great variety of cases and authorities might be cited, showing the intent and application of this rule; but it is deemed sufficient to refer the court to *Parsons v. Thomson*, 1 *Bl. Rep.* 322. *Holland v. Palmer*, 1 *Bos. & Pull.* 95. *Willis v. Baldwin*, *Doug.* 433. *Jackson v. Duchaire*, 3 *Term Rep.* 551. *Pow. Con.* 165. 176. It cannot surely be claimed, that there is any intrinsic quality in fraud, in the light in which we are now viewing it, by which it is distinguished from any other private injury. It is not more strictly prohibited than a trespass to the person or property.

Several cases have been put by the counsel in support of the motion, not analogous. Suppose I employ one, who is a subject of military duty, to labour for me on a day of military review, cannot he recover for the services rendered? Suppose the servant of *A.*, in performing the labour assigned him, be necessarily guilty of a trespass, by passing the close of *B.*; will not the labour done be a good consideration to support an *assumpsit*? The answer is obvious. The consideration of the promise in the first case is not the crime, nor, in the



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I. Whether the printing in question was a private wrong, will be determined by inquiring whether the copyright of the book belonged to the assignee of *Hawley*. The printing was undoubtedly an evasion of that right, admitting it to have existed.

On the part of the defendants, it is claimed, that *Pennyman* had an exclusive right to the book which was printed, on two grounds, viz. first, at common law; and, secondly, under the statute.

First, the author of any literary work had, by the common law, an exclusive right to the copy, both before and after publication; and this right is not limited or impaired by the act of congress made for the encouragement of learning, &c. *Millar v. Taylor*, 4 Burr. 2303. *Donaldsons v. Becket and others*, *Ibid.* 2408. 2 Bl. Com. 411., and *Christian's note*, p. 576.

It has, indeed, been holden, that the statute 8 Ann. c. 19. has limited or abridged the common law in this particular. In that statute is a clause, expressly providing, "that the author and his assignees shall have the sole liberty of printing and reprinting his works, for the term of fourteen years, and no longer." In the statute of the *United States*, which was made at a time when the phraseology in this clause had received a judicial construction, and which, in many of its provisions, is substantially a transcript of the *English* statute, this limitation is wholly omitted. Was it, then, the intention of the legislature of the *United States* to abrogate the common law right of authors? It was, for a long time, held doubtful in *Great Britain*, whether even the statute 8 Ann. had this effect. It was a question, on which the ablest

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judges differed. Not a single clause or expression can be pointed out, from which it can be inferred that such was the intent of the framers of our statute. "Where the common law and a statute differ, (says Judge *Blackstone*,) the common law gives place to the statute; and an old statute gives place to a new one. But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative." 1 *Bl. Com.* 89, 90. The matter of our statute is not even claimed to be thus repugnant to the common law. The statute merely secures the right of authors for a term, or terms, under a new sanction, and gives a new remedy for the violation of it. The statute of this state "for detecting and punishing trespasses" does as much, and might as well be construed to abrogate the common law.

Secondly, but should the opinion of the court be against the defendants upon the question, as to the common law right, still it is insisted, that *Hawley*, and of course *Pennyman*, had acquired a perfect title to the copy, under the act of congress.

The first section of the statute explicitly provides, that the author, &c. shall have the sole right and liberty of printing, &c. for the term of fourteen years from the recording the title, &c. in the clerk's office of the district court. To this provision in our statute may be applied what Justice *Yates* said in the case of *Miller v. Taylor*, of a similar clause in the statute of *Anne*. 8 *Ann. c.* 19. s. 1. By this clause, a sole right is positively vested in the author, during the particular terms, which the statute has limited. The subsequent provisions have, indeed, annexed penalties, and forfeitures of the sheets; but the right is wholly confined to the parties interested, the author and purchasers of copies.

June, 1808. To the author, therefore, it is the same as a lease, a grant, or any other common law right, whilst the term exists, and will equally entitle him to all common law remedies for the enjoyment of that right. 4 Burr. 2380.

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The 3d section makes it an express condition, on which any person is to take benefit of the statute, that the copy of the title be deposited in the office of the district clerk, before publication. In the case now before the court, this condition has been complied with. Why, then, has not a title been acquired?

It is said, that a copy of the district clerk's record has not been published in any newspaper, nor a copy of the book delivered to the secretary of state, agreeably to the requirements of the statute. These acts, it is contended, are in the nature of conditions precedent; so that a right to any literary work under the statute cannot be acquired, except by performing them. The 4th section and the last clause of the 3d are relied on, as fortifying this position.

Upon these clauses, it would perhaps be sufficient to remark, that they are merely directory, and that neither the language in which they are couched, nor their connection with the body of the statute, authorizes the conclusion which they are cited to support. Indeed, as we have before seen, the author's right vests, at the time of depositing the title in the clerk's office; and it is nowhere expressed, that this right shall be divested by any act or omission whatever. Besides, the publication of the clerk's record, in the newspaper, may be at any time within two months from the date thereof; and the delivering of a copy to the secretary of state, at any time within six months from the publication of the book. In the mean time, the author's right is vested; his term has



commenced. What, then, is his situation? Has he no remedy for an invasion of his right?

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It would surely be going too far to say that he has not; the case would suppose a wrong without a remedy.

In perfect conformity to these ideas have been the decisions of courts, and the opinions of lawyers, in *Great Britain*. Thus, though it is there made necessary, by the statute of *Anne*, in all cases, before publication, to enter the title of a book in the register's book of the company of stationers;<sup>(a)</sup> and though it is expressly provided that no one shall be made liable to the *penalty* where this is not done, yet, in such cases, it is well settled that an action may be brought, or an injunction obtained in a court of equity, against any one who violates the right of an author. 1 *Bl. Rep.* 330. 2 *Bl. Com.* *Christian's note*, 578. 4 *Burr.* 2380, 2381. Indeed, in this point, it is believed, a doubt cannot be entertained.

2. But, we contend further, that the printing which *Nichols* claims to have done, was a crime, inasmuch as it incurred the forfeitures of the statute. The clause in which the forfeiture is prescribed, is in these words. [Here the counsel read the second section down to the words "*shall forfeit*," &c. inclusively.] Here it is observable, that not the most distant allusion is made to the lodging of a copy in the office of the secretary of state, as a condition on which the forfeitures are given. But the statute does speak of *publishing* the clerk's record; it prescribes the forfeiture to be incurred by those persons who infringe an author's right, after the record-

(a) By a late statute, it is required, that the whole book, and every volume thereof, be lodged as above mentioned. *Stat. 15 Geo. III. c.*

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ing the title, &c. and *publishing the same*. The expressions here used have been thought to countenance the idea, that at least, the publishing a copy of the clerk's record, is an indispensable condition. But if we look back to the first section, to which the phrase "publishing the same as *aforesaid*," must refer, we shall find, that the only case in which publishing the record is made necessary, is where second terms are sought to be secured. The right of an author is to be protected for a further term, provided he not only record his title a second time, but publish the record, as is elsewhere directed.

This, then, is the publishing, of which the statute here speaks. The clause which prescribes the forfeiture is general, and meant to embrace each of the cases, in which a copyright is supposed to be secured, *viz.* cases both of first and second terms. Publishing the record is made necessary, as we have seen, in one class of these cases; and hence this language, in the 2d section, came necessarily to be used.

If this reasoning be correct, the printing, by *Nichols*, incurred the forfeitures of the statute, and was, of course, a crime.

But other questions have been raised in the course of the argument, some of which were not expected to be agitated here; because they were not supposed to arise out of the allegations in the motion, or the facts that came out upon the trial at the circuit.

1. It is said that it does not appear whether *Pennyman*, or *Hawley*, be a citizen of the *United States*, or resident within the same, or that *Nichols*, in printing, might not have acted under a license, or authority derived from the proprietor. To these suggestions, it

is sufficient to answer, that the motion does not allege any misdirection on these points, as a cause for a new trial; nor was there, in fact, any. The statement in the motion cannot be supposed to present a complete history of the case; but it will be intended to be so far perfect, as to raise every question meant to be tried.

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2. It is also urged that the printing was lawful, because, though done here, the books were to have been sold in *New-Jersey*. To this point is cited the case of *Hudson & Goodwin v. Patten*, 1 *Root*, 133. This was an action brought upon the statute of this state, and the only question raised in the case was, whether vending in *Connecticut*, under the circumstances, was a violation of the right of the plaintiffs. The court held that it was, and accepted the verdict on that ground. This case is in point to shew that the penalties of the statute are incurred, by the bare act of vending; and, consequently, by the bare act of printing. It establishes, therefore, precisely, the negative of the proposition which it is cited to support. And that printing alone incurs the forfeitures of the statute, is settled by the plainest language, and by a long course of uniform decisions.

3. But it is said further, that *Nichols* might not have known that the printing was unlawful; and an attempt is made to assimilate his case to that of a sheriff, who levies an execution upon property supposed to belong, but not in fact belonging, to the debtor, by direction of the creditor, under a promise of indemnification. The two cases, however, are distinguishable in this material point, viz. that in one case, ignorance of fact is supposed; in the other, ignorance of law merely. The sheriff is ignorant that the articles levied on are the property of a stranger; *Nichols* is found by the jury, under the direction of the court, to have had know-



June, 1808. ledge of all the facts, which went to prove the right of  
 NICHOLS *Pennyman*. The ignorance assumed in his justification  
 v. is, therefore, a mere ignorance of law. No case can  
 RUGGLES. be found in the books, where a bond or promise of indemnity to the sheriff, for a wilful trespass, has been holden good.

By THE COURT, SWIFT and SMITH, Js. dissenting.  
 A contract to reprint any literary work, the copyright to which has been secured to the author, is void, unless it is entered into with the consent of the author, or his assignee. And the printer who executes the contract with a knowledge of the rights of the author, can recover nothing for his labour.

The provisions of the statute, which require the author to publish the title of his book in a newspaper, and to deliver a copy of the work itself to the secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright. The publication in the newspaper is intended as legal notice of the rights secured to the author, but cannot be necessary, where actual notice is brought home to the party, as in this case. The copy to be delivered to the secretary of state, appears to be designed for public purposes, and has no connection with the copyright.

Nor can the intent with which the work is reprinted, be taken into consideration, as the act of reprinting is expressly prohibited by the statute. And as it appears in this case, that the plaintiff reprinted the "*Federal Calculator*" after the copyright had been secured, and with actual notice of the fact, he could recover nothing on that account, and the charge of the court to the jury was correct.

New trial not to be granted.

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DAVID BEERS *against* Moss K. BOTSFORD, and the  
rest of the Inhabitants of the Town of NEWTOWN.

MOTION for a new trial.

This was an action of *indebitatus assumpsit*.

The plaintiff declared, that on the 24th of *October*, 1791, *Elijah Abel*, Esq. sheriff of *Fairfield* county, had an execution in his hands, directed to him, in favour of the treasurer of this state, against the defendants, for taxes due to the state, amounting to more than 2,000 dollars, which, on the 15th of *December* following, he levied on the property of the plaintiff, who was then an inhabitant of *Newtown*. That thereupon the plaintiff, with *Abram Baldwin*, *David Booth*, and *Zalmon Booth*, also inhabitants of *Newtown*, executed their receipt to the sheriff, engaging to deliver said property, at the expiration of twenty days, at the sign-post, that the same might be sold on said execution: That said property not being delivered accordingly, an action was afterwards instituted by the sheriff, on the receipt, and a judgment recovered thereon for 612*l.* 8*s.* 11 1-4*d.* damages, and 5*l.* 3*s.* 3*d.* costs, for which execution issued: That this execution remained unpaid, and said taxes uncanceled by the defendants, until the 1st of *January*, 1806, when the plaintiff, at the special instance and request of the defendants, paid to the sheriff the sum of 2,000 dollars, in satisfaction of said taxes and the last-mentioned execution. The declaration then concluded in the common form of *indebitatus assumpsit*.

The defendants pleaded *non assumpsit*; and the plaintiff obtained a verdict. The defendants then moved

In *indebitatus assumpsit* for money paid to the defendants' use, the declaration stated, that an execution had been issued against the defendants, inhabitants of the town of *Newtown*, for taxes; that property had been taken thereon, for which the plaintiff had given his receipt; and that in consequence thereof, he had been eventually compelled to pay this money in satisfaction of said taxes. At the trial, evidence was produced of an execution against the collector. Held, that this was no material variance.

The issuing of a distress by the treasurer of the state against the inhabitants of a town may be proved by parol.

It is unnecessary to prove the existence of a distress against the collector, in order to let in proof of one against the selectmen.

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the court to set aside the verdict, and grant them a new trial, on the following grounds :

1. That on the trial, the defendants proved, by a copy of the receipt, that the execution on which the property mentioned in the declaration was taken, was an execution " against *Abram Baldwin*, collector of state taxes for said *Newtown*." The plaintiff then offered the deposition of *Elijah Abel*, the sheriff, to prove that the execution on which said property was taken and receipted, was not, in fact, an execution against *Baldwin*, but was an execution against the town of *Newtown*. To this evidence the defendants objected; but the court admitted it.

2. That on the trial, the plaintiff also offered in evidence an execution against the selectmen of the town of *Newtown*. To this the defendants objected, and claimed, that an execution against *Baldwin*, the collector, ought first to be produced. The court overruled the objection; and said execution against the selectmen was admitted, without the production of any execution against the collector.

3. That on the trial, the plaintiff also offered parol evidence to prove that an execution had issued against the town of *Newtown*, and that the same was lost, or mislaid, without proving, by record evidence, that such execution had issued; to which the defendants objected; but the court overruled the objection, and admitted the evidence offered.

4. That the court mistook the law in their charge to the jury: First, because the presiding judge directed the jury to find a verdict for the plaintiff, if they should find the receipt was, in fact, given for property taken on an execution against said town, and the amount paid



by the plaintiff: Secondly, because his honour instructed them that it was immaterial whether the property taken, and receipted by the plaintiff, was property belonging to the plaintiff, or to said town, provided they found that the plaintiff had received no indemnity from such property, but had been compelled to pay the execution with his own money: And, thirdly, because his honour also instructed the jury, that though it appeared in evidence, that *Zalmon Booth*, one of the receiptmen, had paid a part of the execution as well as the plaintiff, it was not necessary for the plaintiff to have joined him as a party in the suit; and that each who had paid, might sue separately.

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The several questions arising on the above statement, were reserved for the opinion of the nine judges.

*Gould*, in support of the motion.

1. The plaintiff has stated, as the ground of his recovery, that he has given a receipt of property, and has ultimately paid money on an execution against the town of *Newtown*. From the face of the receipt given in evidence, it appeared that the execution was against *Abram Baldwin*, collector. There is, then, a variance between the declaration and the evidence. Is not this a material variance, and of course fatal? If the execution was against the town, the plaintiff's remedy is against the town; but if the execution was against the collector, then the money was paid for the collector's use, and the plaintiff must look to the collector for his recompense. Suppose I sue *A*. for money paid on his note to *B*.; and the evidence produced is of money paid on the defendant's note to *C*.—is my declaration supported? But that is a case less strong than the principal one; for in that, the right person would be sued, but in this, the wrong. *Savage, q. t., v. Smith*, 2 Bl. Rep. 1101.

June, 1808. and *Bristow v. Wright et al.*, Doug. 665., are in point.  
 BEERS Where special grounds of action are stated in the de-  
 V. clarator, no other ground can be taken at the trial.  
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2. Another ground for the motion is, that an execution was admitted in evidence against the selectmen, before any was shown against the collector. The statute tit. 135. c. 1. s. 4. provides, that if the collector shall neglect to pay over to the treasurer, and settle with him for the tax, the treasurer shall issue a distress against such collector. Sect. 5. directs, that in case of a return of *non est inventus*, or a commitment of the collector, the treasurer shall issue a distress against the goods or estate of the selectmen. Now, if no distress had been issued against the collector, or if one had been issued and had been returned satisfied, clear it is, that the treasurer would not be authorized to issue one against the selectmen, and if he attempted to do so, his act would be irregular and nugatory. The execution against the collector should have been produced for another reason. Because, if it should appear to have been returned *satisfied*, the collector, and not the plaintiff, would be entitled to recover against the town. It would show, that the money paid by the plaintiff was not paid *for the use of the town*.

3. The court mistook the law in admitting parol evidence that an execution had issued against the town. The issuing of an execution can only be proved by *the record*. The loss of an execution may, indeed, be proved by parol; but it would be absurd to receive such proof, until it had been shown, by proper evidence, that one had been issued.

4. The last ground of the motion was concisely stated. but not relied upon.

*Daggett, contra.*

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1. Though there was, in fact, a literal variance between the declaration and the receipt given in evidence, yet we contend that this was wholly unimportant, as the allegation which it was offered to prove might be rejected as surplusage. This was an action of *indebitatus assumpsit* for money paid, laid out and expended to the defendants' use. To entitle himself to a recovery, it was only necessary for the plaintiff to show that he had been compelled to pay money for the benefit of the defendants, and with their consent. The mode in which he was compelled to pay was immaterial. The doctrine of *Savage v. Smith*, and *Bristow v. Wright*, has been overruled by the supreme court of the United States, in the case of *Wilson v. Codman's Executor*, 3 Cranch, 209. In *De Forest v. Brainerd*, 2 Day, 528., there was in fact a variance between the declaration and the proof; but the court held, notwithstanding, that the declaration was supported.

[SWIFT, J. In that case, the court did not consider themselves as departing from the principle of *Bristow v. Wright*. They considered a *continuance* of the party in office as equivalent to an *appointment*. TRUMBULL, J. agreed in this explanation.]

The property of the defendant was taken to *satisfy* an execution against *Abram Baldwin*, the collector. It was also taken to satisfy an execution against the selectmen. There can be but one satisfaction. The satisfaction of one is the satisfaction of the other. Property taken to satisfy one is taken to satisfy the other. There was, then, substantially, no variance, admitting that the allegation in question was one which it was necessary to prove: so that *De Forest v. Brainerd*, as explained, is still an authority in our favour.



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2. It was not necessary for the plaintiff to produce an execution against the collector, because that against the selectmen counts upon an execution previously issued, and returned, against the collector. The execution against the selectmen, *of itself*, proves an execution, against the collector.

But we contend, that it was not necessary for the plaintiff to prove any thing more than an execution against the town. It is enough for an officer to show his execution. Can more be required of him who has paid it?

3. A very satisfactory answer may be given to the third objection, *viz.* that no record is kept by the treasurer of the issuing of a distress, or execution. He is not a recording officer. A *certificate* of the treasurer is not evidence: or, if so, as it is not a record, nor an exemplification of a record, it is still *parol*.

In the last place, we contend that if all these points are against us, the case is such that no new trial will be granted. The plaintiff has paid his money, and he must have it reimbursed. The court and jury have come to a right result. Substantial justice has been done. The court will not grant a new trial, for a mistake in point of law, against the honesty and equity of the cause. *Smith v. Page*, 2 Salk. 644. *Deerly v. The Duchess of Mazarine*, 2 Salk. 646.

Gould was heard at length in reply.

By THE COURT.(a) By the statute entitled "An act providing for the collection and payment of rates and

(a) MITCHELL, Ch. J. having an estate in *Newtown* subject to taxation, and EDMOND, J. being an inhabitant of that town, declined sitting in this cause.

taxes," it is enacted, that on neglect of a collector, the treasurer shall issue a distress or warrant against him, for the amount due; on return of that unsatisfied, he shall issue a distress against the goods, &c. of the selectmen; and on return of that unsatisfied, he shall issue a distress for the sum due, and all charges, against the goods and chattels of the inhabitants of the town; and the several towns are made responsible for the full amount of their proportion of the state taxes.

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By the statute, then, the treasurer issues the several warrants or executions in succession, without the interference of any court. Of course, record evidence does not exist that all or either have issued. The proof rests wholly in parol. From the nature of the case, none other could exist. The minutes of the treasurer, if he made any, must be shown by parol. It was proper, then, to admit the parol evidence offered, respecting the issuing, the levy, and the loss of the executions in question. And proof that an execution had issued against the town was, at least, *prima facie* evidence that an execution had previously issued against the collector, and against the selectmen.

This is substantially an action to recover money advanced by the plaintiff, at the request, and to the use of the defendants. More is evidently stated in the declaration than was necessary. To entitle the plaintiff to a recovery, it must, indeed, appear, that the execution which was levied, and which he paid, was in fact an execution against the town. The evidence of this fact is opposed, on the part of the defendants, by the receipt of the property on an execution against the collector. Yet, as the existence of an execution against the town presupposes an uncanceled execution against the collector, and that he is eventually responsible for the whole; it is possible the receipt may have been impro-

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perly drawn. When evidence is thus apparently contradictory, and yet is capable of satisfactory explanation, it is the peculiar province of the jury to decide. In the direction to the jury on this point, we perceive nothing improper; nor do we conceive it could affect the right of the plaintiff to recover, whether the property receipted was originally his, or belonged to the town, provided it appeared he was not indemnified out of the property. And though others may have advanced money to the town on the same execution, the contract of indemnity is several as well as joint.

We are, therefore, of opinion, that the direction to the jury on the several points stated was legal and proper; and the facts thus submitted to their consideration were the material facts alleged; and being found, are sufficient to show the right of the plaintiff to recover.

New trial not to be granted.

WILLIAM HILLHOUSE *against* LEVI CHESTER.

The maxim *seisinā facit stipitem* has never been adopted in this state; but on the death of the ancestor, the descent is cast upon the heir, without any reference to the actual seisin of such ancestor.

MOTION for a new trial.

This was an action of ejectment for a valuable real estate in *Montville*.

By the statute of distributions, previous to the revision in 1784, real and personal property were placed upon the same footing; and the term "*next of kin*" had the same meaning, whether used with reference to one or the other. When used with reference to real estate, it never meant those only *of the blood of the first purchaser*.



At the trial, the general issue being pleaded, the June, 1808.  
 jury, pursuant to the direction of the court, found a <sup>HILLHOUSE</sup>  
 verdict for the defendant. <sup>V.</sup>  
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The plaintiff moved for a new trial. The case, as it appeared at the trial, and as stated in the motion, was as follows: The Rev. *James Hillhouse*, being seised of the premises, died in 1740, leaving two sons, of whom the plaintiff is one, and a daughter, *Rachel*. The premises were set off to her, as her share of her father's estate. In 1753 she was married to *Joseph Chester*. They had issue a daughter, *Mary*, in 1754. *Rachel* died soon after the birth of *Mary*. *Mary* died in 1765, without issue, under the age of twelve years. *Joseph Chester*, on his marriage, became seised in right of his wife; and, on the birth of *Mary*, as tenant by the curtesy. In *January*, 1801, he conveyed the premises to the defendant, and died in *August*, 1804. On his death, the defendant entered, and remains in possession. The plaintiff claimed title as heir, and next of kin of the blood of the ancestor from whom the estate came.

*Daggett* and *W. Hillhouse*, for the plaintiff.

1. We contend, that *Mary Chester* was never seised of this estate so that a title can be derived from her. The common law maxim, that *seisina facit stipitem*, which has been recognised by every jurist from the author of *Fleta* to *Blackstone*, is decisive against the defendant's claim. This seisin implies not merely a right to enter, but an *actual entry*. The ancestor must have had a seisin *in deed*; for if he had a seisin in law only, it is not sufficient to transmit his estate to his heir. *Fleta*, l. 6. c. 2. s. 2. *Co. Litt.* 11. b. 15. a. *H. H. C. L.* c. 11. 2 *Bl. Com.* 209. But *Mary* was not seised, nor indeed could be; for all the time during her life, the freehold was in her father, *Joseph Chester*, as tenant by

June, 1808. the curtesy. But if the defendant cannot derive a title  
 HILLHOUSE from *Mary*, he has none. He does not claim to be heir  
 v. to *Rachel*.  
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2. But however this point may be decided, we contend, in the next place, that by the statute under which this descent was cast, real estate derived from an ancestor is to descend to those only, who are *of the blood* of that ancestor.

Conveyances and grants of lands, with us, are, and always have been, to the grantee, and to his heirs and assigns, for ever. These terms, which have been immemorially adopted, and sanctioned by the law, designate the extent of the tenure. To his assigns, implies a power of disposition; and, to his heirs, is a guaranty of the property (if not disposed of) to those who stand in the relation of heirs to the purchaser, or patentee. There have been different opinions respecting the origin of these rights; some have considered them merely as of positive institution. "But this opinion," says Judge *Swift*, (*Syst.* vol. 1. 232, 233.) "cannot be well founded; for when a man has acquired an exclusive right to a certain thing, and added to the value of it by his own labour, it is consonant to nature that he should determine who should enjoy the property, which he can enjoy no longer. And in case of his dying without a will, that his estate should descend to his nearest relations." It is a truth, attested by the concurrent feelings of mankind, that every person has a natural right to dispose of the estate he has acquired; and that, on his decease, without manifesting his intentions, it should descend to relatives, in preference to strangers; arising, not merely from the presumption that such would be the wish of the acquirer, but from the mutual obligations of kindred.

The property in question descended from the Rev. June, 1808.  
*James Hillhouse*, (the father of the plaintiff,) who was  
 the first purchaser; between whom and *Joseph Chester*,  
 or the defendant, there never was the least affinity of  
 blood whatever. And yet the defendant claims, that this  
 estate came to him, or to *Joseph Chester*, by descent.  
 Strange doctrine of descents! If such, indeed, be the  
 rule, it must be different from any known in the free  
 and established systems of ancient or modern jurispru-  
 dence.

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The following are extracts from Sir *William Jones's*  
 translation "of the speeches of *Isæus*, concerning the  
 succession to property in *Athens*."

"All genuine, unadopted citizens may devise, provided they have no legitimate children, and be not disabled by lunacy, &c. nor under duress.

"The wills of such as have legitimate sons shall stand good, if such sons die before their age of sixteen years. If a man have legitimate daughters, he may devise, on condition that the devisees take them in marriage. Adopted sons shall not devise the property acquired by adoption; but if they have legitimate sons, they may return to their natural family. If they do not return, the estates shall go to the heirs of those who adopted them.

"No adoption by a man, who has legitimate sons born, shall be valid.

"If a citizen die intestate, and leave daughters, the nearest kinsmen, who marry them, shall inherit; but if he die childless, his brothers by the same father, shall be his heirs. Males, and the children of males, shall be preferred, although in a remoter degree, provided



June, 1808. they belong to the same branch," &c. *H. H. C. L.*  
 HILLHOUSE 2. 81. *note.*  
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In a preceding part of the same note, it is said, that those who married the daughters (under the last of the foregoing clauses) should not have the estate, unless the daughters were living: so that they took the estate merely in right of their wives. They were likewise to be the nearest kinsmen of the intestate. The savings that the brothers should be "by the same father," and that the males who inherited should "belong to the same branch," show, that the blood was regarded, and that the half blood could not inherit, unless they belonged to the same branch; that is, were *of the blood*. Their regard for *the blood* is further evinced by their restricting the power of devising; the object and effect of which was to keep the estate in the blood: and by the provisions that the devisees should marry the daughters of the devisor; and if those who came in by adoption did not return, the estate should go to the heirs of those who adopted them. In a subsequent note, (p. 83.) respecting the *Roman* or civil law, it is observed: "The succession to the estates of intestates, was one of the most uncertain points of the *Roman* law. The distribution which had for some time prevailed, took a different turn, and that even while the emperor was compiling his body of laws; for the system of the novels (the CXVIII. particularly) defeats the doctrine laid down in several of the titles of the third book of the *Institutes*, where the point was considered and meant to be established."

This uncertainty arose, and will always arise, from arbitrary power. After the abolition of the consular, and the introduction of the imperial government, every thing depended on the will, or edict of a despotic and often depraved head. A singular feature in this system was.

that the parents, or either of them, took the estate equally with the brothers and sisters of the deceased. We shall not be surprised at this, but rather that the parents did not take the whole, when we are told, that by the law of the twelve tables, fathers had the power of life and death over their children, and might sell them. As this rule speaks of the succession of both parents, it must refer to property *acquired*, and not coming to the child *by descent*. Another rule in the same code, (as laid down 2 *H. H. C. L.* 87.) providing that where there were no brothers and sisters, *ex utrisque parentibus conjuncti*, nor any of their immediate descendants, the half-blood should succeed, undoubtedly applied to property *purchased* or *acquired*; for the terms *ex utrisque parentibus conjuncti*, imply a reference to, and preference of blood. "According to the laws of *Normandy*," says Sir *M. Hale*, (*H. C. L.* c. 11.) "if lands descended from the part of the father, they could never resort, by descent, to the line of the mother. But in case of purchases by the son, who died without issue, for want of heirs of the part of the father, it descended to the heirs of the part of the mother." Respecting the rule, that "*fratres consanguinei, ex eodem patre, sed diversa matre*," shall take by descent, together with the brothers, *ex utroque conjuncti*, upon the death of such brothers," *Hale* says, (p. 94) "But *quære* hereof, for it seems a mistake. As I take it, the half-blood hinders the descent between brothers and sisters, by their law as well as ours." This rule, undoubtedly, refers to estates by purchase, or by descent where the half-blood was from the common ancestor. In the first case, there would be no great, and in the last, not any, impropriety in the admission of the half-blood.

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Indeed, in considering the systems of descent which have heretofore existed, or which now exist, various mistakes and misapprehensions arise from our not dis-

June, 1808. **HILLHOUSE**  
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**CHESTER.** tinguishing where the rules of inheritance apply to estates acquired by *purchase*, or to those which come by *descent*. By adverting to this distinction, and with the qualifications before referred to, we shall find the rights of the *blood* have been, and are, universally respected.

The principles of inheritance have been adopted by civilized nations, not merely from a regard to private right, but from considerations of public expediency. They are powerful motives to industry; they attach individuals most strongly to society. The patrimony of our ancestors is dear to us, because it was their patrimony. It is the bond of union; it is the beginning of the love of our country; and has been the favourite theme of the poet and the patriot in every age; who have spoken in the most expressive terms of their native soil, because it was the land of their fathers.

Ages before the dawn of *Grecian* literature, or the rise of the *Roman* power, the **ALMIGHTY** himself established the rights of inheritance. The scripture speaks of the land of *Canaan*, as the patrimony of the children of *Israel*, because it was given to *Abraham* for a possession: although the period of many generations had elapsed after *Jacob* and his sons first sojourned in *Egypt*, to the time when their descendants returned to claim the inheritance of their fathers.

That this was not merely a national claim, but that there were rights which appertained to the individuals of the family to which the inheritance was annexed, is evinced in the case of *Zelophehad's* daughters, recorded in the 27th chapter of *Numbers*, which merits attention, as no cause determined by any human tribunal, can claim an equal solemnity of decision. "Then came" (it is said) "the daughters of *Zelophehad*, and they stood



before *Moses* and before *Eleazer*, and before the princes, June, 1808.  
 and before all the congregation, saying: "Our father died in the wilderness in his own sin, nor was he in the company of *Korah*"—[that is, he was guilty of no act of rebellion by which he forfeited his birthright] "why should the name of our father be done away because he has no son?"

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As by the rule excluding the daughters, the name of the deceased would be done away, the question was important. "And *Moses* brought their cause before the LORD. And the LORD spake unto *Moses*, saying: The daughters of *Zelophehad* speak right; thou shalt cause the inheritance of their father to pass unto them."

On this, the general and abiding rules of inheritance are thus given: "If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren. And if his father have no brethren, then ye shall give his inheritance unto his *kinsman, who is next to him of his family*, and he shall possess it." These rules do not appear to have been founded on any political considerations, but on the rights of the parties, arising from the ties of kindred, as it was politically indifferent whether the descent was to one individual, or another, of the same tribe.

A subsequent, which may be considered a national, ordinance, (as in the 36th chapter,) *restricts* the marriage of an heiress "unto one of the family of the tribe of her father"—"That the children of *Israel*" (it is said) "may enjoy every man the inheritance of his fathers."

June, 1808. The rights of inheritance, then, are not only founded  
 HILLHOUSE in nature, but (according to the above and other passa-  
 v. ges of inspiration) have received the sanction of the  
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The foregoing table is the foundation of the common law rules, and of our different statute rules of descent. By that table, the rule is, that on failure of children, the inheritance shall be given to brethren of the deceased; on failure of these, to his father's brethren; on failure of these, to his kinsman who is next to him of his family. By our statute, as it stood before, and on the revision of 1750, under which the present question arises, the rule is, that the estate shall be distributed to the children, &c. and on failure of these, to the next of kin.

"His kinsman who is next to him of his family," and "next of kin," are, we conceive, synonymous terms, when applied to the rights of inheritance. This was the opinion of Sir Edward Coke, who, in 3 *Rep.* 40., speaking of descents, quotes the case of *Zelophehad's* daughters; where he thus renders in *Latin* the concluding part of the table—"sin autem nec patruos habuerit;" and if his father have no brethren, "dabitur hereditas his qui ei proximi sunt"—the inheritance shall be given to those who are next to him, or who are next of kin. And the injunction, with which the rules of descent are closed, he renders "*erit que hoc filiis Israel sanctum lege perpetua*"—and this shall be sanctioned or sealed to the children of *Israel* by a perpetual law. This law he calls a general law, "which extends" (he says) "not only to the said particular case, but to all other inheritances, to all persons, and at all times."

That the divine law may, in many respects, be considered as a general law, to regulate the civil, as well as the moral conduct of mankind, has been the opinion of

many respectable writers, as well as of *Coke*, that source and fountain of legal science. When any principle, contained in that code, does not originate from the peculiar situation and economy of the *Jewish* nation, it ought, from the authority of the divine lawgiver, to have a leading influence. As the rule of descent here noticed did not originate from any political considerations, it must have resulted from natural fitness and propriety.

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Although our former statutes, as well as the statute in question, made use of the term *next of kin*, which is nearly similar to the term used in the *English* statute; yet we are not to suppose, that the framers of our statute were ignorant of the import of the term when applied to the rights of inheritance. It was probably adopted because it was in analogy to the divine rule. This is corroborated by the provision, which allotted a double portion to the eldest son, in which the two tables compare; and where the statute rule was confessedly taken from the scripture. The presumption of this conformity is further corroborated by the known veneration of our ancestors for the divine code. This appeared in all their legislative and judicial proceedings; and is acknowledged by an express statute, commonly called *the Declaration of Rights*: which, in the revision of 1750, and in all the previous revisions, was the first statute in the book. By this, it is enacted, "That no man's goods or estate shall be taken away from him, or any way endamaged, unless it be by virtue or equity of some express law; or in case of the defect of such law in any particular case, by some clear and plain rule warranted by the word of God." This is an explicit recognition of the authority of the divine law, which is acknowledged as the law paramount, in all questions of difficulty or of doubt, arising from the defect of any particular law.



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If from the foregoing reasoning, and from what may hereafter be submitted, the court are of opinion, that the two tables can be reconciled, and that *next of kin*, and his *kinsman who is next to him of his family*, may receive the construction given by *Coke*, and which is here given, the result must be in favour of the plaintiff.

In 6 *Mod.* 143., it is said, "If a statute makes use of a term, it shall receive the same sense that the common law takes it in, and no other," or "it shall be understood in the same sense in which it is understood at common law." It is likewise a rule, that in construing a statute, the subject matter respecting which it is conversant is to be taken into consideration. It becomes, then, important more particularly to inquire the legal import and meaning of *next of kin*, when applied to the rights of inheritance.

*Coke*, in 3 *Rep.* 40., before noticed, considers "his kinsman who is next to him of his family," and *next of kin*, as having the same signification, when applied to the same subject matter.

In *Ruffhead* and *Morgan's* edition of the *New Law Dict.* tit. *Descent*, the rule is thus given: "He which is next of kin in the collateral line of the whole blood, though never so remote, comes in by descent; for there is next of kin by right of representation, and by right of propinquity or nearness of blood." Referring to Sir *M. Hale's* argument in *Collingwood v. Pace*, 1 *Vent.* 415., and to *Radcliffe's* case, 3 *Rep.* 40. Again, from *Bacon's Elements*—"Lands descend, if there be no brother or sister, to the uncle and his issue; and if there be none such, then to the cousins in the nearest degree of consanguinity."

The last rule, where it is said, "*Lands descend to*

*the cousins in the nearest degree of consanguinity,"* is like the term used in the statute without any qualification; and yet it has always been construed to mean cousins in the nearest degree of consanguinity of the blood of the ancestor.

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*Blackstone*, in detailing the rules of descent, (2 Com. 224.) says, "The collateral heir of the person last seised must be his next collateral kinsman of the whole blood."

*Littleton*, 1 Inst. 10., is thus: "*Et si homo purchase terres en fee-simple, et devy sans issue, cheschun que est prochein cosin collateral, del entire sanke, de quel plus long degree qu'il soit, poet inheriter et aver meme la terre come heire a luy.*"

"And if a man purchase land in fee-simple, and die without issue, he which is next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him."

Here *Coke* makes the following comment:

"Upon this word *prochein* (next) I put this case. One hath issue two sons *A.* and *B.*, and dieth: *B.* hath issue two sons, *C.* and *D.*, and dieth: *C.*, the eldest son hath issue, and dieth: *A.* purchaseth lands in fee-simple, and dieth without issue. *D.* is the next cousin, and yet shall not inherit, but the issue of *C.*; for he that is inheritable, is accounted in law next of blood. And therefore, here is understood a division of next viz. next *jure representationis*, and next *jure propinquitatis*; that is, by right of representation, and by right of propinquity. And *Littleton* meaneth of the right of representation; for, legally, in course of descents, he is next of blood inheritable." "And here ariseth a diversity in law

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between next of blood inheritable by descent, and next of blood capable by purchase. And, therefore, in the case before mentioned, if a lease for life were made to *A.*, the remainder to his next of blood in fee, in this case, as hath been said, *D.* shall take the remainder, because he is next of blood, and capable by purchase, though he be not legally next to take as heir by descent.

“Next of kin of the whole blood,” “cousins in the nearest degree of consanguinity,” “next collateral kinsman,” “next cousin” and “next of blood,” (as appears from the above.) are indiscriminately used; and have always been understood with the qualification of blood, when applied to the subjects of inheritance. *His kinsman who is next to him of his family, next to him and next of kin*, are determined by *Coke* to have the same meaning, and to be synonymous terms, when thus applied.

Other precedents might be adduced. Indeed this is the meaning affixed to those terms by all common law writers on descents. Referring to the rights of inheritance, then, *next of kin* has acquired a technical and appropriate signification; and means, and did at the time of enacting the statute in question, mean, *next of kin, or next of blood inheritable*.

“To know what the common law was (we are told) before the making of a statute, is the very lock and key to open the windows of a statute.”

“The best construction of a statute is to construe it as near the rule and reason of the common law as may be.”

“When the provision of a statute is general, it is subject to the control and order of the common law.”  
*4 Bac. Abr. 647.*



By knowing what the common law was, and by June, 1808.  
 taking its rule and reason for our guide, we are fur- HILLHOUSE  
 nished with the lock and key to open the windows of V.  
 the statute in question: and shall be enabled to discover CHESTER.  
 why the term *next of kin* has one signification, when  
 applied to the descent of real estates, and another, when  
 applied to the division of chattels. Personal estate is  
 never considered with reference to any but the imme-  
 diate possessor. The terms *antiquum aut novum* are not  
 applicable to this description of property: and the same  
 rules, both here and in *Great Britain*, prevail respect-  
 ing it, whether acquired by purchase, or in any other  
 way. It cannot be pleaded, without delivering posses-  
 sion: nor is it a subject of limitation, or remainder. "A  
 man (says *Coke*) cannot be heir to goods or chattels."  
 And according to *Fearne*. 342., even a devise of a term  
 of years to *A.* and his heirs, goes to his executor. A  
 variety of instances too may be put, in which words re-  
 ceive a construction according to the subject matter.  
 To say of *A.* he stole, would be a charge of feloniously  
 taking, if it referred to taking any thing personal: but if  
 to any thing annexed to the freehold, it would be merely  
 a charge of trespass. A gift of lands to *A.* and the  
 heirs of his body, is an estate-tail to the one who is  
 heir. A gift *by deed* to *A.* and the issue of his body,  
 to *A.* and his seed, to *A.* and his children, to *A.* and his  
 offspring, give only an estate for life: but the same  
 terms *in a will* give an estate in fee or in tail. 2 *Bl.*  
*Com.* 115.

If a devise is made of lands, and the devisees no  
 otherwise designated than by the term *heirs*, where  
 they must take by purchase, the eldest, or youngest, or  
 all the sons or children will take respectively, accord-  
 ing to the tenure by which the land is holden. "I give,"  
 in a deed, when applied to chattels, is a gift for ever:

June, 1808. but "I give my farm," though in the same instrument,  
 HILLHOUSE transfers only a life estate.

V.

CHESTER.

We shall, therefore, have no controversy with the gentlemen respecting the *English* statute, nor with respect to our statute as far as it relates to personal estate. Nor shall we controvert the authorities which they adduce, the rules and principles of which apply to the same subject. We agree, with regard to any *chattel* interest, *next of kin* means *next jure propinquitatis*; and refers to the last possessor, and him only; but with reference to descents, it means by right of representation and of blood: and is the same, as if the statute had said to the *next of kin*, who, according to the rules of law, and right of blood, is capable of inheriting.

Coke, in the passage before quoted, says that *next cousin*, or *next of blood*, (and which he construes the same as *next of kin*,) when applied to estates by purchase, have relation to the propinquity merely: whereas, when applied to estates by descent, they refer to the line or blood, and mean next of blood inheritable. It is hardly possible, that the rule of construction should be conveyed in language more precise and positive; and which, if not wholly disregarded, must end the controversy; as the reason for the distinction will be still more obvious when these terms are applied to the division of chattels, or to the descent of estates of inheritance.

Whether *Joseph Chester*, or the defendant, is to claim, the effect would be the same; as neither have, or ever had, any affinity of blood to the Rev. *James Hillhouse*, the common ancestor, or *Rachael Chester*, the last of the blood actually seised; and their relationship to *Mary Chester* was merely by the blood of *Joseph Chester*: and as he had no inheritable blood, he could take nothing by

it himself; nor would he transmit any inheritable quality to the defendant. The same rule of construction, which would take this estate from the family of the Rev. *James Hillhouse*, would take it from that of *Joseph Chester*. Merely marrying into a family, and having issue, and the death of the inheriting parent, and of such issue, would entitle the person so marrying, and his connections, to the inheritance. This would be a new mode of acquiring estates; inheritances would be unsettled, and made to dance the roundelay from family to family, by figures totally inconsistent with the established rules of descent: the leading doctrine of which is, that estates of inheritance shall descend to those, and to those only, who are of the blood of the first purchaser. This right of transmitting estates to the heirs of the blood, has always been considered as one of the most important privileges of the *English* law. Sir *Matthew Hale* calls this right one of the *capitula legum*.

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After the introduction of the feudal system into *England*, there was a constant struggle to establish the rights of inheritance; and to preserve estates in the blood. The lord claimed to bestow the feud without any reference to these rights; and various burdens were imposed on heirs, by way of heriots, fines, reliefs, &c. in consideration of their being admitted. These, says *Hale*, (*H. C. L. c. 11. note D.*) were continued even after feuds became hereditary. He adds, "Though grants were construed strictly, yet if not otherwise expressed, collaterals succeeded; because it was conceived merit of blood was part of the consideration."

Though the work of reformation was gradual in *England*, it was finally completed; and the various oppressive tenures were abolished, and changed for the socage tenure by 12 *Car. II. c. 24.*; "A statute," says *Blackstone*, (2 *Comm. 77.*) "which was a greater acqui-



June, 1808.      sition to the civil property of this kingdom than even  
 HILLHOUSE      *Magna Charta* itself.”  
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The partible socage tenure, being that by which we hold, is of great antiquity. This was established among the ancient *Britons*: which they carried with them into *Wales*, as appears (it is said) by the laws of *Hoel Dha*, in the tenth century. The same prevailed among the ancient *Germans*. The *Saxons* and the *Danes* also adopted the principle of partible descents. *H. H. C. L. c. 11. note E.*

The author of *Bac. Abr.* (referring to *Somner*, speaking of gavelkind) says, it was “first introduced by the *Roman* clergy, and therefore propagated more extensively in *Kent*, where the christian religion was first propagated.”

“Socage tenures, says *Blackstone*, (2 *Com. c. 6.*) was always by much the most free and independent of any. And, therefore, I cannot but assent to *Mr. Somner’s* etymology: who derives it from the *Saxon* appellation *soc*, which signifies liberty or privilege; signifying a privileged tenure.”

“Taking this to be the meaning of the word, it seems probable that socage tenures were the relics of *Saxon* liberty. This is peculiarly remarkable in the tenure which prevails in *Kent*, called *gavelkind*, a species of socage tenure; the preservation whereof from the innovations of the *Norman* conqueror is a fact universally known.” This, agreeably to *Mr. Selden’s* opinion, before the *Norman* conquest, was the general custom of the realm; and “the most usual course of descent all over *England*.”

Such was the attachment to this tenure, that fathers

could make no other distribution. "It is not however June, 1808.  
certainly known, whether daughters shared with the HILLHOUSE  
sons in the most ancient times." *H. H. C. L. c. 11.*  
*note R.* V.  
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This tenure, then, is not of feudal, but of *Saxon* origin, and was coeval with the introduction of the christian system; to the rules of which, respecting descents, it bears a strong analogy.

When we consider the antiquity of the hereditary transmission of lands, and the unremitting struggles by which it has been maintained, we shall not be surprised to find it regarded as of the highest importance: and as the principal object of the laws of real property in *England*: or that it should be distinguished as one of the *capitula legum*; and ranked with the sacred right of trial by jury. Our ancestors emigrated to this country, impressed with the same sentiments: nor can we suppose that they would wantonly renounce these rights, and enact laws which would carry the inheritance from the blood. For it would make no difference whether this was done by their own act, or by the overbearing hand of power.

Their attachment to these rights does not rest on presumption. They procured them to be expressly provided for, and guaranteed by the charter, the palladium of their privileges; the *habendum* of which is, "To have and to hold the same (meaning the lands granted) unto the said governor and company, and their associates, their heirs and assigns; to be holden of us, our heirs, and successors, as of our Manor of *East Greenwich*, in *free and common socage*."

By the charter there was a concession on the part of the crown, that the patentees should, and by its accept-

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ance, an agreement on their part, that they and those who held under them, would hold according to the tenure of free and common socage. They could convey by deed, or devise; otherwise, the estate must descend to those coming within the meaning of the term heirs, according to the rules applicable to that tenure, which required that they should be of the blood. On failure of these, the estate would escheat. The crown undoubtedly might claim that the terms of the grant should be pursued. We have shown, that the socage tenure was partible in its nature, and whether so or not, in practice, would not effect the rights of the crown. But that the charter might have been extended by the grantees so as to admit another description of persons not within the terms of the grant to inherit, in exclusion of those who were entitled, (for such would be the effect of their construction.) could not, we conceive, be maintained, as the charter is paramount to any statute. Although we are not (since our independence) liable to a forfeiture, still it must have its full operation, and cannot be altered: and a statute as relative to it, must receive the same construction as it would at any time have received. Besides, the charter contains an express guaranty to the heirs of the right of succession.

About 1730, there was an information exhibited to the king and counsel against the colony, by Mr. *Winthrop*, complaining, that the intestate law was contrary to charter, as it contradicted the rule of primogeniture, or unity of descent. Upon which the king and council passed an order vacating the statute; and a committee was appointed by the house of lords, who reported, among other things, that an act of parliament should be made, requiring that all the laws of the colony should be sent to the king and council for approbation. This occasioned a very serious alarm here; and it was thought prudent, under these circumstances, to consider the intestate law as vacated.



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But it was recommended to the courts to continue the practice of dividing lands and real estates in common to all the children and heirs, which was done. The assembly also sent a representation to *England*, virtually claiming their right to adopt the partible socage tenure, and stating the necessity and advantages of having lands and real estates descend in common to the children, and the injury that must have arisen to the settlement and improvement of the colony, by restricting the descent to one child, or heir. Mr. *Winthrop* having settled the matter with his sister, (Mrs. *Lechmore*,) the business was never pursued any farther in *England*; and on the next revision of the laws, the statute in question was enacted.(a) The above accounts for the very particular manner in which the distributing clause of this statute is introduced. That real estates were taken entirely from the blood by the statute, formed no part of the above complaint. Had that been one ground, it could not have been answered: and as this formed no part of the charge, we may certainly conclude, that no such construction or practice had ever prevailed.

In addition to the provisions of the charter, the act entitled "An act about the tenure of lands" provides, "That whatsoever lands have been, or shall be granted to the respective townships, or to any particular person or persons, shall be held to them, their heirs, successors, and assigns, for ever, according to the most free tenure of *East Greenwich*, according to our charter."(b)

A subsequent statute (the preamble of which is, that townships' grants of lands may be settled upon them, their heirs, successors, and assigns for ever) directs,

(a) This is not strictly correct. See *Stat. Comm.* p. 267. note (13); edit. 1808. R.

(b) *Stat. Comm.* tit. 97. c. 1. s. 1.

June, 1808. "that they shall take patents for holding such tracts of  
 HILLHOUSE lands, to them, their heirs, successors and assigns, firm  
 v. and sure, according to the tenure of our charter, in free  
 CHESTER. and common socage; which patents shall be sufficient  
 evidence for holding the said lands firm to them, their  
 heirs, &c. for ever."<sup>(a)</sup> The first of these statutes was  
 passed *October*, 1672, and the last, *October*, 1685, and  
 have ever since continued in force.

They contain three distinct recognitions of the charter, as the foundation of title; and four positive provisions, that all grants of lands shall be to the grantees, or patentees, their heirs, successors, and assigns, for ever. It must be conceded, that the rights thus secured will enure to the respective heirs of succeeding grantees. This must arise from the very terms of the grant "to their heirs, successors, and assigns, for ever;" from analogous rules applied to the statute *de donis*; and from the circumstance that these statutes were from time to time re-enacted. Our forms of conveyance too, have immemorially been to the grantees, and to their heirs and assigns for ever. These forms are recognised in the revision of 1750, by "An act concerning the town clerk's office," which provides, that a grant, when recorded in a particular manner, shall be evidence for holding the premises "to the grantee, his heirs and assigns, for ever."<sup>(b)</sup>

It becomes, then, material to inquire what is meant by the term *heirs*; to whom the inheritance is thus repeatedly guaranteed. "An heir is he to whom lands, &c. by act of God, and right of blood, do descend of some estate of inheritance; *nam Deus heredem facere potest, non homo.*" 1 *Inst.* 7.

(a) *Stat. Conn.* tit. 97. c. 1. s. 3.

(b) *Stat. Conn.* tit. 162. c. 1. s. 4.

“Heir and ancestor, *hæres et antecessor*, are always applied to natural persons, predecessor and successor to bodies politic.” 1 *Inst.* 78. June, 1808.  
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“A man, by common law, cannot be heir to goods and chattels; for *hæres dicitur ab hæreditate*.” 1 *Inst.* 8.  
“*Vel dicitur ab hærendo, quia hæreditas sibi hæret*.” 1 *Inst.* 7.

“The word *heir* implies that the party hath all those legal qualifications which our laws require.” 3 *New Abr.* 17. The author of which [Tit. *Descent*, C. note a.] observes—“In a long course of time, it being impossible to compute to the first marriage, they therefore computed from the last possessor, provided the heir that claimed was of the blood of the first purchaser.”

“And note, (says *Ld. Coke*,) it is an old and true maxim in the law, that none shall inherit any lands as heir, but only the blood of the first purchaser, for *refert à quo fiat perquisitum*.” 1 *Inst.* 12.

The term *heir*, or *heirs*, then, is an appropriate term; and those who claim as such, must stand in relation of heirs, in right of representation, and of blood; particularly, they must be of the blood of the first purchaser. The charter provides, and successive statutes enact, that lands shall descend to those who stand in this relation. It is, however, contended, that they descend to a motley description of persons, who, not being of the blood, possess none of the requisite qualities; and whose characteristics are abhorrent to hereditary succession.

Although we have not adopted the statute of the 2 *West.* 13 *Edw.* 1. c. 1. called the statute *de donis*, yet the same inquiry will arise in our action of ejectment, as would arise under the writ of formedon, given by that



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statute. If the plaintiff can show, that he is entitled *secundum formam doni*, or by the terms of the original grant or charter, he must recover; especially as that, or the descent to heirs, is recognised and sanctioned by repeated statutes.

“If divers statutes (it is said) relate to the same thing, they all ought to be taken into consideration in construing any one of them.” 4 *Rep.* 4. 2 *Ld. Raym.* 1028.

In *The Earl of Aylesbury v. Patterson*, *Doug.* 30. Lord *Mansfield* says—“All acts *in pari materia* are to be taken together, as if they were but one law.” The charter, then, these different statutes, and the statute of distributions, must be taken together.

Were the latter capable of receiving the construction for which the defendant’s counsel contend, it must be controlled by the former, which uniformly declare, that lands shall descend to the heirs. But we have shown, that *next of kin*, when applied to descents, means, and has always meant, next of kin *of the blood*, or next of kin *inheritable*: consequently, this, when thus applied, and the term *heirs*, are of the same import. The charter, and these various statutes, are a conclusive confirmation of our construction. By this all differences will be reconciled, and the established rules of inheritance preserved.

The claim of *Joseph Chester* to be heir to *Mary Chester* would contradict another rule of descent, that estates of inheritance cannot lineally ascend. Aside from gravitation, and from feudal policy, there existed at common law, and under our statutes, substantial reasons for this rule respecting estates by descent.

The estate which came to the child by descent, could

not, in the ordinary course, come from the parent who survived; but it must come from the parent, or stock of the parent who died during the life of the child. To allow the surviving parent to be heir to the child, in that case, would be to carry such estate from the blood. It is but passing it to the parent, and it is immediately in the hands of strangers.

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Another reason arises from the situation of the parent, as natural guardian of the child: as no person who may be heir to an infant shall be his guardian in socage. For the law judges it improper to trust the infant in his hands, who may by possibility become his heir.

*Purchase and descent* are the only modes of acquiring estates recognised by law.

Purchase, taken in its most extensive sense, is thus defined by *Lyttleton*: the possession of land, &c. which a man hath by his own act or agreement; contradistinguished from acquisition by right of blood, and includes every other mode of coming to an estate. 2 *Bl. Com.* 241.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. 2 *Bl. Com.* 201.

We would ask, under which the defendant claims: is it by right of representation as heir of the blood?

We have before seen, that he who claims land by descent, must be of the blood, and that it will escheat before it can go to one who is not of the blood of the first purchaser.

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Descent implies a progressive continuance in the line, or channel in which the thing spoken of has heretofore moved: and the term inheritance is never used but with reference to the line or blood of the first purchaser. Indeed, it would be a solecism in language, a contradiction in terms, and opposed to every principle of law respecting descents, to say that an inheritance can descend from *A.* to *B.* directly, or by any indirect course; when *B.* is a total stranger to the blood and family of *A.* The defendant's title then cannot be by descent, and no one will pretend that it is by purchase.

Nor can the descent, or distribution of real estates, be governed by the construction which is given to the *English* statute, which respects merely the distribution of personal estate, unless the ability and legal capacity to hold the two descriptions of estate are altered.

Aliens are capable of receiving and holding personal estate; but are totally incapable of holding lands, either by purchase or descent. As it respects personal estate, or letters of administration, an alien may be next of kin: but as it respects estates of inheritance, he cannot be next of kin: that is, although he is next of kin *jure propinquitatis*, and actually takes the personal estate, yet as it respects real estate, his want of legal capacity prevents his being next of kin to take by descent. This shows that next of kin must be understood with reference to the subject to which it applies: and that it has a different signification when applied to real, from what it has when applied to personal estate. Or, as *Coke* very aptly expresses it, *next of kin, when applied to descents, means next of kin inheritable.* It will be no answer to our argument to say, that the present statute will in future prevent the consequences here stated as the result of their construction. The same construction must be given to the



statute under which the present question arises, as June, 1808.  
though no subsequent statute had been made.

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But it is said, that difficulties would arise in the settlement of estates, if under this statute a different direction may be given to the real, from what is given to the personal estate. There could, however, be no greater difficulty in that case, than under the present statute; where different directions may, and in many cases must, be given. Besides, it is a general principle of law, and which holds in every department of science, that the most worthy shall govern: according to the maxim, *omne majus dignum trahit ad se minus dignum*. If then the terms used in the statute import a different description of persons when applied to real, from what they import when applied to personal estate, and the estates cannot be separated, and but one construction must be given, the signification of the term or terms, as applied to the real estate, must govern, as that is the most worthy.

It is claimed, that by adopting the terms of the *English* statute, we adopted their construction.

This cannot be inferred from the adjudications of our courts, from the time when our statute was enacted: nor from its provisions. The *English* courts have adjudged, that where *A.* dies leaving personal estate, and one brother *B.*, and three nephews of *C.*, another brother who is dead, that *B.* and the nephews take *per stirpes*: if *B.* is also dead, leaving one child, that the child of *B.* and children of *C.*, take *per capita*. Our courts have adjudged, that in both cases they take *per stirpes*. In the first case, the *English* courts exclude the uncles from, and in the last admit them to, a share with the brother's children. On these different constructions of the *English* courts, Judge *Swift* (2 *Syst.* 288.) says, "I

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know not by what principle of common sense, or rule of logic, it can be said, that children do not represent their parents, unless some of their uncles are alive;" and asks if it is not equally right to exclude the uncles of the intestate, in one case as the other. Under the *English* statute of the 22d and 23d Car. II. c. 10. (which is their statute of distributions,) the father and mother took the whole estate in exclusion of the brothers and sisters. This gave rise to the statute, 1 Jac. II. c. 7. which provides, that the mother should come in for a share with the brothers and sisters: on which it is observed, [2 Bac. Abr. 428.] "the reason for making this act, it is said, was because the mother might carry all away to another husband: but the husband surviving is entitled to the whole personal estate."

The grandmother is preferred, and the great-grandmother has been preferred, in the administration, to the uncles and aunts.

The warmest advocates for conformity, will not contend that these principles have ever been admitted under any of our statutes, even respecting the division of personal, much less respecting the descent of real estates.

It was for a long time much controverted in the *English* courts, whether even the descent of chattels should be governed by the canon law, or by the rules of the common law. And according to 2 Lev. 173. as late as Trin. T. 29 Car. II. "It was said at the bar, that the ecclesiastical court gave half shares to the half blood, which *Rainsford* and *Wild* held reasonable."

The construction given to the *English* statute by their courts, has, from time to time, varied: nor could it be said, that it had any fixed construction at the time our

first statute of distributions was enacted : the difference in the time of the two statutes being only about twenty years. As to any established construction, therefore, the statutes must be regarded as contemporaneous; especially, considering the distance and the means of information respecting any adjudications, or principles of exposition, which were there adopted.

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Nor will the provisions of the statutes compare.

The *English* statute directed their prerogative courts, after expense, &c. paid, to make an equal and just distribution among the wife and children, &c. "or otherwise to the next kindred of the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*; and to compel such administrators to observe and pay the same, *by the due course of his majesty's ecclesiastical laws*." Our statute provided, on failure of children, that a part of the estate should be allotted to the wife. "The residue, both of the real and personal estate, equally to every of the next of kin of the intestate, in equal degree, and those who legally represent them."

We will not remark on the words of the *English* statute "to the next kindred of the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*;" or notice their difference, when compared to the terms of our statute; but merely observe, that all is there to be decreed, settled and done "by the due course of his majesty's *ecclesiastical laws*."

At the time of enacting the statute, our ancestors had not the most favourable opinion of "*his majesty's ecclesiastical laws*;" as the very recollection of them was accompanied with the ideas of tithes, test acts, Bishop *Laud*, and the inquisition. This accounts for their total



June, 1803. silence in that respect; and shows, that they did not mean to extend the rules of that code to the distribution or descent of real estates; leaving them to operate on things within their peculiar province, as causes matrimonial and testamentary.

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The necessary conclusion is, that estates of inheritance were to be regulated and distributed, under the provisions of the statute, by *the good old rules and principles of the common law.*

There had been, at an early period, some attempts to give the term *next of kin*, with reference to estates of inheritance, the construction now claimed, in exclusion of the blood. The Hon. *Thomas Fitch*, afterwards Governor *Fitch*, who in his day had no superior, professionally or judicially, as a lawyer, or as a judge, was appointed to prepare the revision of the statutes, in 1750. He was opposed to any deviation from the good old rules of descent. Although he supposed the then law or custom, as it is called, sufficiently explicit; yet, to put it out of doubt, and to prevent any misconstruction here, or misapprehension in *England*, he inserted the introductory clause of the statute in question, by which it is expressly declared, that lands and real estate, had "by immemorial custom and common consent, descended to and among the children or next of kin of such intestate, *as heirs.*"

Judge *Reeve*, in his "*Essay on the Import of the Term Heirs,*" (p. 10.) says, that "where the heir takes in character of heir, he must take in quality of heir," and this will hold *è converso*. This, then, is the same as if it had said, that lands, &c. had descended to the next of kin, who stood in the relation of heirs; or that they had descended to the heirs *vi termini* next of kin; construing next of kin to mean next of kin inheritable. This

is fully confirmed by what follows: where it will be noticed with what solicitude the clause is guarded.

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It not only says that "real estates have descended to and among the children, or next of kin of such intestate as heirs" but that the "same have been divided to and among *such heirs*;" and again, "that the estates, both real personal, of persons dying intestate, have ever since the first settlement of this colony, been divided among, and settled upon, *the heirs of such intestates*."

It was not enough to say, that lands and real estate had descended to the next of kin, as heirs, and that the same had been divided among *such heirs*, but it expressly declares, that they had, from the first settlement of the colony, been divided among, and settled upon, *the heirs*. Which last, if the others could be doubted, is sufficient to show, that the term is used in its technical and appropriate sense. And it is a fact, that lands and real estate, from the first settlement of the colony, uniformly descended to *the heirs*, or to those *of the blood*; till the *Buckingham* case, which will be noticed.

That the rules of the common law prevailed, particularly respecting the descent of real estates, is further evinced by the expression, "by two different courts, proceeding in different methods, and by different rules." Here are two courts proceeding not only in different methods, but by different rules. By rules distinguished from the methods, or forms of proceeding, must be meant, that in some cases they were governed by the rules peculiar to prerogative courts, while in others they were regulated by the rules of the common law. And here the common law rules must have referred to the descent of real estates, as the distribution of chattels,

June, 1808. Was always within the peculiar province of the prerogative court.  
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Nor is the statute in question sufficient to vest a fee in the next of kin, unless they claim as heirs of the blood, as there are no words of limitation. The words of the statute are—"And in case there be no children, nor any legal representatives of them, one moiety of the personal estate shall be allotted to the wife of the intestate for ever; and *one third of the real estate for term of life*: the residue, both of the real and personal estate, equally to every of the next of kin of the intestate, in equal degree, and those who legally represent them."

It is not said what estate the next of kin are to take, unless it is governed by the preceding limitation to the widow. One third of the real estate is allotted to the widow for term of life, and then immediately follows "and the residue to the next of kin:" which, according to the rules of construction, would mean in the same way. In that case, it would be only an estate for life in the next of kin: or in the case before the court in *Joseph Chester*.

The truth is, this statute was never designed to alter the established rights of inheritance; but merely to provide a method in which estates were to be divided or distributed. The statute, says *Holt*, (*Rep.* 252.) "is but a direction how he" (the administrator) "shall administer." And such was the uniform construction which the statute received, till the decision of the *Buckingham* case, in 1764; which we beg leave to notice.

Mr. *Buckingham*, by deed or will, gave a valuable real property, lying in *Hartford*, to his mother, who gave it to the *South Society*. The deed or will to the



mother was, for some informality, set aside. Mr. Seymour, who was counsel for the society, then determined to claim the property, on the ground, that the mother was next of kin to her son, (who died without issue,) in opposition to the collateral kindred of the blood. Although the idea was treated as chimerical by the profession generally, he moved the court of probate, in 1761, for distribution, which was made by respectable freeholders, and accepted by the court, in favour of the collateral heirs of the blood. This was, in 1762, affirmed by the superior court; as no doubt was then entertained respecting the law, or rules of descent.

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On this affirmance, a writ of error, by petition, was brought to the general assembly, where an opportunity presented of putting in requisition all that extraneous influence, which has been too frequently practised to obtain what could not be otherwise obtained. In addition to the deed or will in favour of the mother, there was a pretence (it is said) that the property originally belonged to the family of the mother, and circumstances of abuse from the claimants towards her, were stated: all calculated to make improper impressions in a question merely of legal right. By adhering to the long established course of former decisions, an important fund, or foundation for a fund, was to be taken from a society in *Hartford*, where the question was agitated, and the *focus* of action, and from a society, too, which was considered as a main pillar of the prevailing system.

The governor and council, however, founding themselves on principle and precedent, withstood these combined incidents; nor was it till after repeated applications, from *September*, 1762, to *May*, 1764, and after considerable changes in the council, that the decree of the superior court was reversed.

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A decision, under these circumstances, cannot be considered as a precedent; especially when it is recollected, that such tribunals as unite legislative and judicial powers, too frequently blend them in practice; and decide questions of legal right from the particular circumstances of the case, and not from the strictest regard to principle.

It may perhaps be said, that there have been correspondent decisions of the superior court. The superior court were, in 1764, composed of members of the council, and, to be consistent, would undoubtedly adhere to the rule then adopted; nor could we expect a different result, till the influence by which that decision was produced had subsided; and some have been on the bench of the superior court, within a few years, who were in the court, and in the council, in 1764.

We by no means admit, that that, or any analogous decision, was ever acquiesced in as law. It can be said with truth, that the innovating spirit of 1764 was viewed, by the respectable part of the profession, and by reflecting men generally, who traced its consequences, with disapprobation, as not founded in justice or in law.

This appeared in the case of *Hull v. Hanford*, decided by the superior court, soon after *Buckingham v. Treat*, in favour of the parent, in exclusion of the blood. This was brought by error to the general assembly; and the house of representatives reversed the decree of the superior court, on the principle, that *next of kin* meant *next of kin of the blood*; according to the common law acceptation of the term. The council, however, consisting of the members of the superior court, and of those who had been in the former vote, refused to concur in the reversal. This, however, showed the sense

of the house of representatives, and the public impression; and evinced no very great respect for what might be called an *ecclesiastical postulatium*.

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The same question was again agitated in parson *Ross's* case—whose wife claimed as heir to her child, by a former husband, opposed to the blood. This came by appeal to the superior court. Mr. *Ross*, who was a shrewd man respecting property, dared not risk the trial of it there, or before the general assembly. After lying several years in the superior court, the cause was compromised by dividing the property.(a)

Indeed, the doctrine thus attempted to be established, maintained a constant warfare from its rise to its exit; which happened in 1784, on the first revision of the laws, after the *Buckingham* case was decided. By this, the general assembly showed their disapprobation of the principle of that decision; corrected as far as possible the mischief; and fixed not only what the law should be, but, as we say, what it had been.

A cursory view of some leading facts will discover how far the defendant's claim can be warranted on the ground of established practice and precedent.

The only attempt which we find to wrest the statute, as now claimed, till the *Buckingham* case, was in *Pettibone v. Buell*; which, as will be noticed, was decided in favour of the blood on an antecedent point, not applying to this part of our argument. This was in 1712. The court are there requested by the counsel for the heirs of the blood in their plea, "to remember the case of *John Blackledge, jun.*" as in their favour.

(a) These cases were stated from MS. notes of the Hon. *Jonathan Sturges*.



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In 1727, an explanatory act was passed, in which a distinction is made in the construction of the term *next of kin*, as applied to *real* or to *personal estate*; establishing, it is contended, that which we claim.

Statutes from time to time were enacted, and re-enacted, which expressly provide, that the tenure of lands should be to the grantees, and to their heirs for ever: agreeable to which, and to the charter, were the forms of conveyance then adopted.

In a preamble to the clause of the very statute in question, it is declared, that from the first settlement of the colony, lands, &c. had descended to the heirs.

In the *Buckingham* case distribution is made, and accepted by the court of probate, and affirmed by the superior court, in favour of the blood: and although the governor and council were importuned into a compliance, yet their perseverance in the right evinced that they considered themselves as justified by former practice and precedent.

The surprise and alarm occasioned by that decision, showed, that it was regarded as involving a new and unheard of principle.

Such, then, was the law previous to any statute, and such was the construction of the statutes from the time the first was enacted, till 1764.

"Great regard (says the author of *New Abr.*) ought, in construing a statute, to be paid to the construction which the sages of the law who lived about the time, or soon after it was made, put upon it; because they were best able to judge of the intention of the makers:" referring to 2 *Inst.* 11. 136—181.

To apprehend the force of the above rule, as applicable to this case, we need only consider that here had been a practice under the law, and a construction of the statute by the very sages who probably enacted it, for a period of about one hundred years. And what is there to oppose to this in point of precedent? A mushroom adjudication, nursed in the hot-bed of religious party zeal, with some spurious emanations, which maintained a doubtful existence, from *May*, 1764, when the *Buckingham* case was decided, to *January*, 1784, when the next revision of the statutes was completed; a period short of twenty years. Can this be placed in competition with a construction and practice thus immemorially adopted, and sanctioned, in conformity to the precepts of the law, the provisions of the charter, and of different statutes?

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An unequivocal confirmation too of our construction, we claim, is to be derived from the terms of the statute, as revised in 1784; and which is the same as the present statute; founded on these considerations:

1. If it is now just, that those of the blood should have the inheritance of their ancestors in preference to strangers, it was just previous to 1784, and was always so.

2. It is not to be presumed that such important rights should not be fixed, or that the legislature meant to make different tables of descent; and to give the inheritance to those of the blood at one time, and to strangers at another.

3. The present statute gives the true meaning of the term next of kin, by adding *of the blood*; and which was implied in the former statute, according to the

June, 1805. common law acceptance of the term, when applied to descents.

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4. Had a new law been intended, it would undoubtedly have been so made; whereas, the act of 1784 was brought forward by the committee (who were appointed to revise) merely as a revision, and as such adopted: and the only difference is, that some parts were then given in detail, which were before expressed in general terms.

An inference in favour of our reasoning may be drawn from the character of the committee, the Hon. *Roger Sherman*, equally distinguished for ability, integrity and prudence, and the Hon. *Richard Law*, possessing alike the public confidence.

Under a power to revise, such men would not make important innovations, nor would a new system of descents be framed.

They considered the statute then enacted as a revision, and as such it was adopted; and in the act confirming this revision, a clause is inserted, it would seem, with a view of guarding against the suggestions now urged.

“ Provided (are the words of the clause) that such of the foregoing laws as remain in substance the same as before the revisal, shall be considered as having continued in force from the time they were first enacted; any circumstantial amendments or alterations notwithstanding.”

Declaratory and explanatory acts are not uncommon in the statute books; and our courts have respected these, while in force, as part and parcel of the original



acts to which they refer; even in cases which had arisen between the precedent and subsequent acts.

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*Holt*, Ch. J. thus expresses the rule; [Ld. *Raym.* 1028.] "A subsequent statute may be comprehended within the meaning of an act precedent, (as the statute of 32 *Hen. VIII.* of wills, within the 27 *Hen. VIII.* of jointures,) when the latter statute is within the same reason as the former: 29 *Car. II.* c. 3. p. 35. respecting the right of the husband to take administration on the estate of his wife, is included in 22 and 23 *Car. II.* c. 10.

We would ask, are not all the statutes of distribution within the same reason? Had the general assembly, in 1784, expressly declared, that next of kin meant, and had always meant, of *the blood*, according to the common law rules of descent, the court would have considered themselves bound to give the term that construction; even where the inquiry was respecting its import anterior to that time.

*Goddard and Gurley*, for the defendant.

The plaintiff moves for a new trial for a misdirection on two points: first, that *Mary Chester* was so seised as to be capable of transmitting the estate to her heir; and, secondly, that by virtue of the statute then in force, *Joseph Chester*, on her death, became entitled to the estate, as her heir.

1. We contend, that according to the *English law*, a title to the estate could be derived from *Mary*. Whenever an actual entry cannot be made by the person entitled, there may be a *constructive* seisin. Thus, as to remainders and reversions, where an actual entry by the person entitled is impracticable, if he exercises an act of ownership over the estate, this will be deemed

June, 1808. equivalent to an actual seisin of an estate capable of  
 HILLHOUSE being reduced into possession by entry, and will make  
 v. the person exercising it a new stock of inheritance.  
 CHESTER. Where lands are held under a lease for years, and the  
 lessee has entered under his lease, the heir will be considered as having seisin without entry, and even before receipt of rent; because the possession of the lessee for years is his possession. Where lands are let on leases for lives, the freehold being in the lessees, the heir has no immediate right of entry on the death of his ancestor, but is only entitled to the rent reserved in the lease; by receipt of which, he becomes seised of the rent, and of the reversion expectant on the determination of the lease. The entry of the heir upon *any part* of the estate is constructively a seisin of all the lands lying in the same county. If the heir be deterred from entering through fear of bodily injury, he may make claim as *near* to the estate as he can, and this will give him seisin for a year and a day. The seisin of one joint-tenant, coparcener, or tenant in common, enures to all. But to come nearer to this case, the possession of a guardian in socage, is the possession of the ward; and the latter thereby acquires seisin without entry. In *Goodtitle v. Newman*, 3 *Wils.* 516., it was decided, that where a posthumous son is born, and the mother is in possession of the lands, of which his father died seised, she becomes his guardian in socage; and the infant son will be thereby deemed to be actually seised of the inheritance, so as to exclude the half blood. In a later case, where a person died, leaving two daughters by different venters; the mother entered as guardian in socage, and received the profits; it was held, that this gave such a seisin to the daughters, that, on the death of one of them, the other could not inherit from her. Lord *Kenyon* said, nothing can be clearer, than that *an infant may consider whoever enters on his estate, as entering for his use.* *Doe v. Kecn*, 7 *Term*

*Rep.* 386. This decision was made in view of all the learning on the subject.

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Admitting, however, for the sake of argument, that by the rules of the *English* law, a title to this estate cannot be derived from *Mary*, yet we contend, that by the law of *Connecticut*, the title was so far vested in her, as to be transmissible to her heir. In this state, the father is tenant by the curtesy only until the child comes of age. The rents and profits of the estate are given to the former during that period, for the nurture, education, and support of the latter.<sup>(a)</sup> When the reason ceases, the estate determines. A tenant by the curtesy, therefore, has only a *term for years*. But the word *seisin* is applicable only to an estate of *freehold*. On the death of the ancestor, the heir is seised of the freehold, and the tenant by the curtesy, after entry, is *possessed* of a term for years. This distinction between the *seisin* of the freehold, and the *possession* of the tenant for years, has been established from the time of *Braxton*, who says: "*Item dare potest quis terram quam alius tenet ad terminum annorum, salvo tamen firmario termino suo, quia istæ duæ possessiones sese complacentur in unare, quod unus habeat liberum tenementum, et alius terminum.*" It follows, then, even upon *English* principles, that where the tenant by the curtesy has but a term for years, his estate does not interfere with a *seisin* of the freehold in the heir. But whether *Mary* was seised or not, she had an interest in the property in dispute; and this interest, whatever it might be, descended to her heir. Our statute determines the mode in which *all the property* of a deceased person shall be disposed of. The terms are such as comprehend all estates to which the intestate had the right of possession, as well as the right, and actual possession. The wife is

(a) In support of this position, a note of one of Judge *Reese's* Lectures upon "*Estates*" was read by the counsel.



June, 1808. **HILLHOUSE** v. **CHESTER.** to have her dower "in one third part of the real estate of her deceased husband, which he stood possessed of, in his own right, at the time of his decease." (a) An inventory is to be made "of all the estate of the person deceased, as well moveable as not moveable, whatever." (b) "A just division or distribution" is to be made "of all the estate, both real and personal, of any such intestate." (c) After provision has been made for the wife, "all the residue and remainder of the real and personal estate" is to be distributed to those standing in the relations specified. (d) Where there is a deficiency of personal estate to pay debts, the court of probate is authorized "to order the sale of so much of the real estate as shall be sufficient to pay the same." (e) Now, suppose *Mary* had married and had children, and died during her father's life. Must not her estate or interest in these lands be inventoried? Might not the court of probate order it to be sold for the payment of debts?

A tenant by the curtesy, to say the least, has not a greater estate than a dowress has. Suppose *A.* dies seised of lands, which are assigned to his widow in dower. During her life, *B.* a son and heir of *A.* dies, insolvent. Is not the interest of *B.* in these lands to be inventoried, and made subject to the order of the court of probate.

The truth is, that by our law there is no difference between actual and legal seisin. He who has the right of possession, has, in contemplation of law, the possession.

If it be true, that *Mary* was so seised as to be capable of transmitting the estate, she is to be considered as the

(a) *Stat. Cōn.* tit. 51. c. 1. s. 1. (b) *Id.* tit. 60. c. 1. s. 1.  
 (c) *Id.* s. 12. (d) *Id.* (e) *Id.* s. 22.

*proposita*; and from her the title, by inheritance, must be derived. June, 1808.

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2. The question then is, secondly, whether, by the statute then in force, the estate, on the death of *Mary*, vested in *William Hillhouse*, the maternal uncle, or *Joseph Chester*, the father. The words of the statute are "the residue, both of the real and personal estate [shall be distributed] equally, to every of the next of kin of the intestate, in equal degree, and those who legally represent them." The literal signification of the term *next of kin*, or nearest kindred, we apprehend, will admit of no dispute. But whatever the term may intend, in its popular acceptance, the law, it is said, has given it a different, and much more limited signification, which is, next of kin of those, only, *who are of the blood of the first purchaser*. Though it be a general rule of construction, that the meaning of words is to be taken according to common acceptance; yet if, on the present question, a contrary rule has been adopted and followed through a long series of judicial decisions, we could now only acquiesce. That such was, uniformly, the fact, until the case of *Buckingham*, in 1764, is confidently asserted by the counsel for the plaintiff. Unfortunately, however, the proof rests on this assertion, merely. The assertion would, therefore, be sufficiently answered by a simple denial. But, however the law might have been held, previously to 1764, it is conceded, that the authority of *Buckingham's* case maintained its ground in despite of the attacks of its numerous and powerful enemies, which, we are told, kept it in a state of constant warfare, until the revision of the statute, in 1784; which put an end to the contest. We do not, however, agree that the decision of *Buckingham's* case was an innovation upon the ancient law. The preamble to the statute of 1750 furnishes strong evidence to the contrary. "And whereas the lands and

June, 1808. real estates of persons dying intestate, in this colony, by ancient and immemorial custom, and common consent of the people, have descended to and among the children, or next of kin, of such intestate, as heirs of such intestate; and the same, by order of the courts of probate, have generally been divided to and among such heirs, in common, with the chattels, or moveable estate. And the estates, real and personal, of persons dying intestate, have, ever since the first settlement of this colony, been divided among, and settled upon, the heirs of such intestate," &c. This preamble declares, that it had been an *immemorial custom* to divide the *real estate* among the heirs of the intestate, *with the moveable estate*. But it is certain, that, in the distribution of the *moveable estate*, no regard is paid to the blood of the first purchaser, neither here, nor in *England*, under the statutes 22 and 23 *Car. II.(a)* but the parent will inherit before the collateral and more remote kindred. In the preamble, no mode of dividing *real estate*, different from that of distributing *personal chattels*, is mentioned; but it is expressly declared to have been the custom to divide the one *with* the other. This idea is corroborated, and a very satisfactory reason assigned, by the preamble to the statute prohibiting the sale of heiresses' estates, without their consent. "Whereas in the first settlement of this colony, *land was of little value*, in comparison with what it is now, by which means it became a general custom that the *real estate* of any person, which, either by descent, or by will, *became the estate of his daughters*, whether they were seised of it, at the time of their marriage, or whether it descended or came to them, during their coverture, *became thereby the proper and sole estate of their husband*; and might be, by them, alienated, or disposed of, without the knowledge and consent of such wives." This statute was

(a) 2 Bl. Com. 520.



enacted in 1723. It conclusively shows, that, until June, 1808. that period, the real and personal property of *femes covert* were on the same footing, *both being absolutely at the husband's disposal*. The reason was, that it "was of little value," and therefore did not require to be protected with more solicitude than property of a different description. The conclusion seems obvious, that if the real estate of *femes covert* was not supposed to deserve a greater degree of care than her personal property, the former could not have been thought of sufficient importance to be kept, inviolably, in the line of the blood of the first purchaser.

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But, in opposition to all this, and to show that the decision of *Buckingham's* case was contrary to former practice, it is said, that that case was so decided by a vote of the house of representatives, obtained by *extraneous influence*, and much against the opinion of the council; who, it seems, at last concurred with a very bad grace; and not until the people, at the instigation, we suppose, of the *Hartford South Society*, had exerted their *irresistible influence*, by removing some of the most stubborn of the honourable body, and appointing others, of a more pliant temper, to fill their places. This, indeed, was an argument of such convincing energy, that the members of the council ever after acquiesced, even when on the bench of the superior court; though, it is intimated, that *some of the judges* regarded the decision with no great complacency; so that *Parson Ross* himself, though, probably, a man of abundant resolution, had too much "shrewdness in point of property" to venture on a trial of the question; but was fain to divide the estate with his antagonist, and let the matter rest as it was.

As to the statute of 1727, it does not support the construction contended for by the counsel for the de-

June, 1803. **HILLHOUSE** v. **CHESTER.** defendant, but directly the contrary. It gives no preference to the kindred of the intestate, who are of the blood of the first purchaser, unless they are, also, of the *whole blood* of the intestate, while the other kindred, in equal degree, are of the *half blood*. Neither does it vest the estate in the kindred of the *transverse* line, before those of the *ascendant* line, unless both are in equal degree. Thus, by that statute, the brothers and sisters inherit before the parent; "and the *parent*, from whom the intestate descended, shall be admitted before the *uncle*, or cousin german, or brother's children;" no regard being had, in this case, to the blood of the ancestor from whom the estate descended.

We remark, on the whole, that the construction of the statute, contended for by the defendant, is not justified by the words of the statute itself, nor by the purview of other statutes relating to a similar subject; nor does it appear to be authorized by ancient decisions. These decisions, indeed, are involved in much obscurity. But so far as they are known with any degree of certainty, they support the contrary doctrine. And if it may be said to savour of hardship, that the estate should be taken from the family of the original owner, and given to a stranger, it is to be recollected, that that hardship does not now exist, having been removed by later statutes. At all events, the precedent, about to be established, can have but a narrow operation, very probably not beyond the case by which it is occasioned.

**BY THE COURT.** The statute of distributions, which was in force in this state, at the death of *Rachel*, places the real property of a person who died intestate upon the same footing as personal: that is to say, both kinds of estate were to be distributed to the same persons, without any regard to the maxim *seisina facit stipitem*. The claim, therefore, of the plaintiff to the land in ques-

tion, on the ground that she was the person last actually seised, as next of kin to her, fails; for on *Rachel's* death, who left issue *Mary Chester*, her only child, the lands descended to said *Mary*, and she was, although a minor, legally seised of those lands as heir to her mother. This has always been the received opinion in this state, and the practice has been conformable thereto, that on the death of an ancestor the descent was cast upon his heir, without any reference to the actual seisin of such ancestor; and the right of such heir to the real property of the intestate was the same as his right to his personal property. The plaintiff cannot, therefore, inherit this estate as next of kin to *Rachel*. If he can inherit the estate in question, it must be as next of kin to *Mary Chester*, his niece.

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It cannot be pretended, that the plaintiff is next of kin to *Mary*, if we give the same construction to the words which they have received in the *English* law. The rule of construction, which has obtained in that law, has been uniformly the same, since their introduction into it. By the statute of *Hen. VIII.* administration on the estate of an intestate is directed to be given to the next of kin. It has always been held, that to ascertain who this person is, the computation of kindred is to be made according to the rules of the civil law. So too the statute of distributions, enacted in the reign of *Car. II.* directs, that if there is no issue of the intestate, his personal property shall be distributed to his next of kin. To ascertain who that person is, the computation is always made according to the rules of the civil law. Our statute, which directed that in such an event the estate of the intestate, both real and personal, should go to the next of kin, was enacted at a time when the aforesaid statute of *Car. II.*, and the construction given to it, was perfectly known. It is a sound rule, that whenever our legislature use a term, without defining it, which is well known in the *English*



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law, and there has a definite, appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the *English* law. In the present case, the father of *Mary* was her next of kin, according to the computation of the civil law, being in the first degree, whilst the plaintiff was in the third degree. For the same reason that *Mary's* personal estate would have gone to her father by the *English* statute, both her personal and real would go to her father by our statute, for he is her next of kin; and there is no possibility of resisting this conclusion, unless the term *next of kin*, when used in our statute, mean to point out one person, when real property is concerned, and a different person, when personal property is concerned.

It is to be observed, that there is no intimation in the statute, that those terms are to be understood in two different senses. Both kinds of estate are directed to be distributed to the *next of kin*. There must be some very cogent reason to induce a belief, that the legislature did not intend, in all cases, that both kinds of estate should go to the same persons.

It is claimed that the term *next of kin* in our statute, as it respects real property, means the next of kin *inheritable at common law*. So that when there are no issue of the intestate living at the time of his death, we must resort to the *English* common law to discover who may inherit his real property, by which law the ascending line is excluded, and every person in the collateral line, except the next collateral kinsman of the whole blood, who himself is of the blood of the first purchaser.

Certain it is, that the statute intimates no such thing. But it is contended, that this is the meaning of the terms, when real property is concerned. In the *English*

law of descents, we never find these words so used standing alone as in our statute. The rule in their law is, that on failure of issue of the person who died actually seised, his real estate shall go to his next collateral kinsman of the whole blood, who is of the blood of the first purchaser. It would be very strange, that the words next of kin in our law should designate the character just described, when they would not designate such person in their law. Where *A.* devised a real estate to *B.* his daughter for life, with remainder over in fee to his next of kin, without other words or explanation, it was determined, that on the death of *B.* this estate should go to the next of kin, computing kindred according to the rule of the civil law, and not to the next collateral kinsman of the whole blood, &c.

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If the legislature of this state had discovered an anxiety in other respects to preserve entire the rules of descent established by the common law, it might have furnished some ground for a conjecture in favour of the plaintiff's claim; but that is not the case. Instead of respecting the *English* law of descents, they have provided, that there shall be no preference given to males; that females shall inherit equally with them; and also, that there shall be no preference given to the eldest male. If then a man dies intestate, instead of the real property descending to the eldest son, to the exclusion of his brothers and sisters, it descends equally to all his children, whether male or female. The object of our statute is to distribute the estate of an intestate person equally among all those who are in the same degree of relationship; and this object would be defeated, if such construction should be given to the term *next of kin* as is contended for by the plaintiff. For, if we consider the term as meaning such next of kin only as are inheritable at common law, then no person can inherit to the intestate, except the eldest male, however many

June, 1808. persons there may be in the same degree of kindred according to the computation of the civil law. It must be the next collateral kinsman to the intestate of the blood of the first purchaser; for he alone, as the next of kin, is inheritable according to the *English* law of descents. To adopt this rule, we must give a construction to the terms next of kin, which they have never received before; and this is to be done in opposition to the manifest intention of the legislature, who enacted the statute. It is opposed to the received opinions among lawyers, and all the modern decisions in this state.

New trial not to be granted.

WILLIAM BUTLER *against* GIDEON BUTLER.

When a witness has been examined by the party against whom he is called, as to his interest in the event, other witnesses cannot be inquired of as to his interest; and it makes no difference whether such examination was under the general oath, or the *voire dire*; nor whether it was in court, or before a magistrate taking a deposition out of court.

MOTION for a new trial.

This was an action upon the covenants in an indenture of apprenticeship, by the master against the defendant, who had bound his son an apprentice to the plaintiff. At the trial to the jury, the defendant offered the deposition of *Amos Butler*, the apprentice, in evidence. To show that this deposition ought not to be admitted, and that *Amos Butler* was interested in the event of the suit, the plaintiff offered one *Ensign* as a witness to prove, by the acknowledgments of the defendant, that *Amos Butler* had an interest in the event of the cause. This was objected to, because upon the cross-examination of *Amos Butler*, before the magistrate who took his deposition, the plaintiff had inquired of *Amos Butler* himself as to his interest in the event of the suit. And the



court ruled, that *Ensign* could not be examined for this purpose. After a verdict for the defendant, the counsel for the plaintiff moved for a new trial on this ground. The question was reserved; and was now argued by *Brace* and *T. S. Williams*, against the motion, and *Edwards*, in support of it.

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Against the motion it was said—The rule that a party cannot examine a witness as to his interest, and then examine other witnesses to contradict his testimony on that point, is perfectly well settled in *Great Britain*. In the case of *The Queen v. Muscot*, 10 *Mod.* 193., *Parker*, Chief Justice, says, “that the law gives the party his election, to prove a person offered as a witness interested, two ways, (*viz.*) either by bringing other evidence to prove it, or else by swearing the person himself upon the *voire dire*; but though he may do either, he cannot do both.” This has ever been considered as a principle of the common law. *Peake’s Evid.* 186., 2d *London edit.* It has been recognised by the courts in *Massachusetts*, 1 *Mass. T. Rep.* 222.; and by the superior court in this state. The cases in the *English* books, it is admitted, are cases where the *voire dire* oath had been administered, and the inquiry had been made under it. The reason of which is, not that the law would not have been the same, had the inquiry been made under the witness’s oath, (could such an inquiry be permitted,) but a rule having existed, that no objection to the competency of a witness can be made after he has been sworn in chief, and examined; 4 *Burr.* 2252. 1 *T. Rep.* 719. it follows, that no inquiry can be made of the witness himself, or of any other person, to prove the interest of the witness, except for the purpose of invalidating his testimony. But by our practice, the examination as to the interest of a witness may be made at any time during the trial; and as well under the witness’s oath, as the *voire dire* oath; and as the

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effect of the examination in excluding the witness would be precisely the same in one case as the other, the effect as to excluding other testimony, to prove the interest, ought to be the same. If it were otherwise, the party who wishes to prove the interest of a witness, will always apply to the conscience of the witness himself, under the *general oath*, and not under the *voire dire*; and if the witness denies his interest, he may then prove it by other testimony; and will, in this way, have all the benefit of an examination under the *voire dire* oath, without the disadvantage of it. And thus the common law principle will be entirely subverted.

It is said, that there is no reason why the party who has examined a witness, as to his interest, should be precluded from inquiring of others as to the same fact, any more than if he had examined him as to usury, or a fraudulent conveyance, &c. But in those cases, the inquiry is not made by way of attacking the competency of the witness, but only affecting his credit. Besides, this objection applies with the same force to an examination after an inquiry under the *voire dire* oath, as under the witness's oath.

But the decisions in this state have never recognised any distinction, whether the examination was made under the *voire dire* oath, or under the general oath. In either case, it has been uniformly holden, that no further inquiry should be had. *Mallet v. Mallet*, 1 Root, 501. *Coit v. Bishop*, 2 Root, 222. *Tudor and Woodbridge v. Hart*, Nov. 1807.

That this was a question contained in a deposition, and not put in open court, surely can make no difference. The witness who deposes before a magistrate, must have the same rights, and the party examining

him can have no greater, than if the examination were made in open court.

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In support of the motion, it was contended, that the testimony of *Ensign*, to prove the interest of *Amos Butler*, ought to have been admitted. That the plaintiff had once a right to prove the interest of the deponent is not denied. How has he lost that right? By asking the question as to the interest of the witness from the deponent himself? But it is not readily perceived, how an interrogatory to a witness, upon a cross-examination, can deprive the party of a right before existing. Does it make the witness, the witness of the party asking the question? If so, why will not any question asked of a witness, as to a fraudulent conveyance, or usury, or any other matter, make him the witness of the party as to that matter?

The right of cross-examining witnesses is a right all important to the purposes of justice; but it will be dangerous to exercise it, if, in so doing, the party runs the hazard of depriving himself of his own testimony.

It is agreed, that where the witness has been examined as to his interest upon the *voire dire* oath, it cannot be proved in another way: the reason of this is, that by such examination, he is, to that point, the witness of the party examining him, who cannot, therefore, impeach him. And this is proved by the form of the oath itself.

This is a strict rule, and ought not to be extended any further than that case, and does not apply to the case where a witness has been sworn in chief and answered interrogatories, upon a cross-examination. But the question was not under the *voire dire*, nor even in court, but a question put before a magistrate, who had



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authority, indeed, to take the deposition, but no authority to administer the *voire dire* oath, or to determine as to the propriety of the person's being a witness. This question, therefore, thus put, should have no more effect, than if the same question had been put to the witness, upon trial of this cause at the *County Court*; and that certainly would never have prevented the plaintiff from proving the fact of interest by other testimony, when the case was removed to the *superior court*.

The case of *Coit v. Bishop*, cited for defendant, was where the party attempted to draw from the witness a confession of interest, after having called other witnesses without success. The case of *Mallet v. Mallet* was not, like this, a question put before a justice on cross-examination; and of all the cases cited decided in this state, it is sufficient to remark, that they were not brought before the *supreme court* for their opinion.

BY THE COURT, GRISWOLD, Judge, dissenting.

It is a settled rule, that the interest of a witness may be shown, by the testimony of others, or from the witness himself: and the party challenging has his choice of either mode of proof, but not of both; for it is not reasonable, that the party should be permitted to sport with the conscience of the witness, when he has other proof of interest. It is immaterial whether a witness be examined as to his interest under the form of the *voire dire*, or under the general oath to witnesses: in either case, an appeal is made to him under oath.

Depositions are by law admitted from necessity, or for conveniency, and the evidence thus taken is, as far as possible, to be subject to the rules of oral evidence. The same necessity for appealing to the witness for proof of his interest exists, whether he deposes before

a magistrate, or testifies in open court; and if not permitted, the evils of trial by depositions will be greatly increased. Such inquiry, then, is proper, and the consequence must be the same as if made in court.

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We are, therefore, of opinion, that the *superior court* were correct in excluding further proof of interest; and that a new trial ought not to be granted.

New trial not to be granted.

JAMES BENNETT *against* NATHANIEL HOWARD, jun.

WRIT of error.

It is a sufficient ground of arrest of judgment, that one of the jurors conversed about the cause, while it was on trial, with persons not of the jury.

This was an action on the case. The plaintiff alleged in his declaration, that on the 15th of *February*, 1802, he sailed from *New-London*, as a seaman on board the ship *Dispatch*, of which the defendant was master, on a sealing voyage to the *Pacific Ocean*, under an agreement to receive, as wages, a certain share of the profits of the voyage: and that during the voyage, the ship put into the harbour of *West Point*, one of the *Falkland Islands*, barren, uninhabited, and in an intemperate climate. While the ship lay at this island, the plaintiff was ordered to go on shore by the defendant; who afterwards refused to receive him again on board the ship; but, without the fault of the plaintiff, left him, contrary to his will, with nine other seamen, on the island, destitute of provision, and without the necessary means of procuring subsistence: by which his health was impaired, and his time wasted. Which doings of island, and come on board the ship; which the plaintiff refused to do, to show that he had fears of ill usage, then offered to prove particular instances of abuse of the crew, by the inferior officers of the ship. Held, that such evidence was not admissible.

The plaintiff declared, that the defendant, being master of the ship on board of which the plaintiff was a seaman, left the plaintiff, contrary to his will, on a desolate island in the *South Sea*. The defendant proved, that he commanded the plaintiff to leave the

The plaintiff,

June, 1806. the defendant were averred to be fraudulent and malicious; and with a design to deprive the plaintiff of his share of the profits of the voyage.  
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The cause was first tried, on the general issue, at *Hartford, November* term, 1806. A verdict was found for the plaintiff. The defendant moved in arrest of judgment;

1. For the insufficiency of the declaration.

2. For that one of the jurors, empannelled in the cause, and who joined in the verdict, freely conversed about the case, while it was on trial, with other persons, not of the jury, publicly declaring that the defendant's conduct could not be justified; and gave his opinion in favour of the plaintiff, before the testimony had been received, and the cause argued.

3. For that one or more of the jurors, being opposed to the verdict, as first returned, and finally accepted, at last agreed to join in the verdict, after the jury had been returned to a second and third consideration, upon a mistaken apprehension, that after having once come in with a verdict, he could not deny his assent to it again, and on that ground, only, he assented to the verdict.

To the first reason, the plaintiff replied, that his declaration was sufficient.

To the second reason, that the matters contained therein were untrue, and insufficient.

And to the third reason he demurred.

The court adjudged the declaration sufficient. As to the second reason, the court found, *that one of the jurors,*



*empannelled and sworn in the cause, and who joined in the verdict, freely conversed about the case, while it was on trial, with other persons, not of the jury; but that the other facts alleged in the second reason were not true. The third reason was adjudged sufficient.*

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The verdict was set aside, and the cause ordered for a further hearing. It was again tried, on the general issue, *February* term, 1807.

The defendant, to rebut the charge that he would not suffer the plaintiff to come again on board the ship, but left the plaintiff on the island of *West Point*, against his will, now produced sundry witnesses, who testified, that the defendant commanded the plaintiff, and the other persons who were on the island, to come on board the ship, which the plaintiff and the other persons refused to do. It was proved, that when the order to come on board was given the plaintiff and his companions on the island, they replied that they were willing to do their duty, on board the ship, if the defendant would oblige himself to them that they should have their *lays* (shares of the profits) at the end of the voyage, and that they should receive good usage on board. And to show that the plaintiff and his companions had apprehensions of ill usage, the plaintiff offered evidence to prove, that during the voyage, and before the ship arrived at the island of *West Point*, the crew had suffered extreme ill usage from the officers; particularly, that *John Howard*, the second mate, had, without provocation, beaten two of the seamen with such severity as occasioned their deaths; and that he had seriously wounded three others, without being punished, or reprimanded for it, by the defendant; although the facts were within the defendant's knowledge; which the plaintiff also offered to prove. And that those were the reasons why the plaintiff, and the other seamen who

June, 1808. were left, ought to have security for future good usage. To this evidence the defendant objected; and the court ruled, that it was inadmissible. A verdict was found for the defendant, and the plaintiff filed his bill of exceptions.

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The errors assigned were, first, That the allegations in the second reason contained in the defendant's motion in arrest of judgment, which the court found to be true, ought to have been adjudged insufficient. Secondly, That the allegations in the third reason contained in the plaintiff's motion in arrest, were also insufficient. Thirdly, That the evidence offered by the plaintiff at the second trial of the cause, and rejected by the court, ought to have been admitted.

*Ingersoll and Bradley*, for plaintiff in error. The allegation in the motion in arrest, that "one of the jurors conversed freely about the case, while it was on trial," is too general. A juror may lawfully speak *about* the cause, if what he says does not relate to its merits. Thus, he has a right to relate who the *parties* are; to say that the jury have agreed on a verdict; or any thing else, which does not, in the language of the juror's oath, concern "the business and matter they have in hand." The allegation found, by the court, to be true is, indeed, not traversable. The only material allegation is negatived by the finding of the court.

The last exception is, merely, that the juror concurred in the verdict, in consequence of his ignorance of the law. But this averment cannot be made; for the defendant is estopped by the record, which is as conclusive of his voluntary concurrence in the verdict, as it is of the judges' concurring in the judgment.

The evidence offered by the plaintiff, as stated in the bill of exceptions, is not to prove the averments in the

declaration; to explain the fact proved by the defendant, that the plaintiff refused to comply with his order to come on board the ship; and therefore remained voluntarily on the island: It is to show, that to stay on shore was resorted to as an expedient less dangerous than to return to the ship; which the plaintiff offered to show he could not do, without hazard of his life. For this purpose the evidence was admissible.

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1. Because the cruelties exercised upon the crew by the inferior officers of the ship, were chargeable upon the plaintiff; since, when they came to his knowledge, he refused to restrain them.

2. Because circumstances might exist of such a nature as would justify the plaintiff in refusing to return on board, without being assured of proper treatment. What these circumstances were, he had a right to show.

*Daggett and Terry*, for the defendant in error.

BY THE COURT. The oath of jurors obliges them to "speak nothing to any one concerning the matters they have in hand, but among themselves, nor suffer any to speak to them about the same but in court, until the verdict is delivered up in court." (a)

In this case, the court below found, that one of the jurors conversed freely with persons not of the jury, about the case, while it was on trial. This was directly contrary to his oath. To suffer such practice to obtain, would be of very dangerous tendency, by opening the way to corrupt the streams of justice; and would destroy all confidence in the trial by jury.

(a) *Stat. Conn. tit. 102. c. 1. s. 14.*



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The testimony offered, and rejected by the court, was wholly inadmissible. The gist of the action, as laid in the declaration, is the leaving the plaintiff, contrary to his will, upon a desolate island, in the *South Sea*, by the defendant; which the defendant attempted to show was not true, by proving that he invited, and even commanded, the plaintiff to come on board, and proceed on the voyage.

The plaintiff, by the testimony offered, and rejected, attempted to show another cause of action, viz. that he was unwilling to return on board the ship, and proceed on the voyage, through fear of abuse and ill usage. It could have no tendency to show or establish the facts alleged in the declaration, or put in issue; and would have led to an inquiry into facts out of the case, which might have had a very improper influence on the minds of the jury.

Judgment affirmed.

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INHABITANTS OF THE TOWN OF OXFORD *against* THE  
INHABITANTS OF THE TOWN OF WOODBRIDGE.

WRIT of error.

There being two parishes in the same town, a pauper resided in the first four years; he then removed to the second, and resided there six months, when it was incorporated into a distinct town; he remained there after the incorporation four years and six months, and then went away. Held, that he gained no legal settlement in the town last mentioned.

This was an action of *indebitatus assumpsit*, brought by the town of *Woodbridge* against the town of *Oxford*, for money paid, laid out, and expended, for the support of one *Philo Bradley*. In the county court, the general issue being pleaded, the jury found a special verdict, stating, that prior to *October, 1799*, the town of *Oxford* was a parish of the town of *Derby*; that about the 1st of *May, 1795*, *Bradley* removed from *Plymouth*, in

*Litchfield* county, to a place in the town of *Derby*, without the limits of *Oxford*, whence he removed to a place in *Oxford*, in *May*, 1799; that in *October*, 1799, the parish of *Oxford* was incorporated into a town; and that he resided in the territory of *Oxford*, from the 1st of *May*, 1799, until the 1st of *May*, 1804, supporting himself and family during the whole time, and then removed to *Woodbridge*, where he became chargeable.

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Upon these facts, the county court decided, that the defendants were liable for his support, and rendered judgment accordingly. On error to the superior court, that judgment was affirmed.

*Staples*, for the plaintiffs in error.

The statute points out several ways in which a man may gain a legal settlement in a town; and one, among others, is, by residing and supporting himself for the term of six years.(a)

(a) By *Stat. Conn.* tit. 91. s. 4. it is enacted, "That any inhabitant of any town in this state may remove with his or her family, or if such person have no family, may remove him or herself into any other town in this state, and continue there without being liable to be warned to depart, or to be removed therefrom, except in the case hereinafter provided; and shall gain a legal settlement in the town to which he or she may have so removed, in case he or she shall reside in such town for the full term of six years next from and after his or her first removal into such town; and shall, during the whole of said term, have supported him or herself, and his or her family, if such person have a family, at the time of said first removal, or at any time during said term, without his, her, or their becoming chargeable to such town, or to the town that may by law be liable to charge for the support of such person and family; but if any such person shall, at any time before the expiration of said term of six years, become unable to support and maintain him or herself, and family, if any be, and become chargeable to the town, that may be liable to charge for his, her or their support; in that case, every such person, with his or her family, if any be, may be removed to the place of his or her last legal settlement," &c.

June, 1808. It is contended by the defendants in error, that the pauper in question comes within this provision of the statute. But this, we contend, is impossible; for the town of *Oxford* had not been incorporated six years, when he moved away. [This case was argued on the supposition, that the whole time that the pauper resided within the territory of *Oxford*, before and after its incorporation, was more than six years; but as the record does not support, and the decision of the court does not appear to proceed upon, such a state of facts, a further report of the arguments of counsel is omitted.]

*Ingersoll* and *N. Smith*, for the defendants in error.

BY THE COURT, MITCHELL, Ch. J. and BALDWIN, J. dissenting. If the pauper in question has gained a settlement in the town of *Oxford*, it is because he has resided in the town for the full term of six years. Such are the plain, positive directions of the statute; and no rights or duties exist, as applicable to this case, except what are created by statute. The only point of inquiry, then, must be, has the pauper so resided? This is, at once, answered in the negative, by the record; and his residing in *Derby*, before the incorporation of *Oxford*, can have no effect whatever.

Judgment reversed.



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JESSE ROOT, jun. *against* THOMAS BULL, EZEKIEL WILLIAMS, jun. SPENCER WHITING and JOHN RUSS.

MOTION for a new trial.

This was an action of *assumpsit*, stating that the defendants, in July, 1805, received of the treasurer of the state of *Connecticut*, 10,000 dollars, to and for the use of the several proprietors of the *Connecticut* title to the tract of land called the *Connecticut Gore*, to be distributed among the proprietors according to the several proportions by them respectively owned; which money was paid to the defendants, in pursuance of a resolve of the general assembly, granting 40,000 dollars to the proprietors of the *Gore*, for relinquishing to the state, their right and title, and all claim relating to the *Gore*, and that the plaintiff was the owner of six shares or four hundredth parts, and entitled to the trust and benefit of six shares, and held certificates duly executed, signed by the trustees of the *Gore*, and dated 4th of *December*, 1796.

In an action of *assumpsit* by A claiming to be a proprietor of *Gore* scrip, against A. B. C. and D. who had received money for the use of the proprietors, the defendants cannot give in evidence a receipt signed by the plaintiff and another for such scrip to account with the company, to prove that the plaintiff is not a proprietor.

That the defendants gave notice in a public paper, that upon the proprietors' delivering up their certificates to the defendants, they would pay to the respective proprietors, their proportions of 10,000 dollars: and that the plaintiff tendered to the defendants his certificates; and the defendants became liable to pay.

*Non assumpsit* was pleaded; and the plaintiff read in evidence his certificates, each, signed, and sealed, by *Jeremiah Halsey*, *Jacob Ogden*, *Hezekiah Bissell*, and *Thomas Bull*, trustees of the *Gore Company*, declaring, that *Jesse Root*, jun. was entitled to the trust and benefit of one four hundredth part of the *Connecticut Gore* of land so called, [describing it] as held by the trustees in

June, 1808. a deed of trust, dated the 8th of *April*, 1796; and that the plaintiff and his assigns were to hold the same according to the tenor, and upon the conditions in the deed of trust, and two several sets of articles of agreement, for conducting the management and improvement of the land, one dated the 17th *September*, 1795, the other the 8th *April*, 1796, and subscribed by the persons composing the company.

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The defendants then stated, as their grounds of defence, that the certificates claimed by the plaintiff were, and ever had been, the property of the *Gore Company*, and that *Jacob Ogden*, one of the directors, and a trustee of the company, about the 1st of *December*, 1796, put said certificates into the hands of the plaintiff, (without the name of the plaintiff having been inserted as grantee, but a blank left to insert the name of the grantee) as a broker to sell, for the use and benefit of the company, and to account with the company; and that afterwards, before the 8th of *April*, 1797, the plaintiff entered into a copartnership with *Samuel Ledlie*, in the business of brokers, under the name of *Root and Ledlie*; and on the 8th of *April*, 1797, it was agreed by *Root and Ledlie*, and *Ogden*, as a director of the *Gore Company*, that *Root and Ledlie*, as partners and brokers, should hold the certificates as trustees for the company, and as brokers sell them upon commissions, and account with the company. To prove which, they offered in evidence a receipt, signed *Root and Ledlie*, dated 8th of *April*, 1797, of the following tenor: "Received of *Jacob Ogden*, trustee of the *Connecticut Gore Company*, six scrip in the *Gore*, No. 269, 270, 271, 272, 273, 274." [the numbers described in the declaration] "to sell for said company on commissions, at the order and direction of said *Ogden*, and account for the same on demand, to said company." The plaintiff objected to this receipt being read in evidence; and the court ruled, that it

should not be read in evidence. And the defendants were thus compelled to suffer a verdict against them; and moved for a new trial; the consideration of which motion was reserved for the opinion of the nine judges.

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*Goodrich*, in support of the motion.

The defendants are sued as having received the money of the proprietors of the *Gore Company*, of which the plaintiff claims to be one. The money is held by the defendants for the use of the proprietors. If the plaintiff is not one, it is the duty of the defendants not to pay to him, but hold the money for those who are proprietors; and payment by them to the plaintiff, would not discharge the defendants. The question then arises, is the plaintiff a proprietor? The certificates produced were certainly *prima facie* evidence that he was. The receipt offered in evidence, would have shown conclusively, that he was not; but that he held these scrip in trust for the company, whose agent the defendants are. Why then should not this fact be proved? A memorandum in writing, signed by the party, is offered in evidence. And surely, the nature of the plaintiff's rights may be explained by written evidence under his own hand.

If *A.* gives to *B.* a broker, his note to sell in market, and *B.* gives a receipt declaring the use for which he holds it; and instead of selling the note, *B.* brings a suit upon it against *A.*; may not *A.* give the receipt in evidence to show the nature of the transaction! And in this state, it can make no difference that this is a deed; as the condition of a deed, though on a separate paper, may control the deed as between the parties, so may any writing explaining it. The defendants offer to show, that so far from having the rights of a proprietor, the



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plaintiff was only the agent of the proprietors, for a certain purpose; not having performed the duty he undertook, can he now avail himself of the benefit arising from his own neglect? This must be the result, unless the evidence is admitted. And the plaintiff, in an action founded on the purest principles of equity, is to *recover* money, which, by written evidence, it appears he has no right to *retain*.

It can make no difference, that this receipt was signed with the name of *Ledlie* as well as *Root*. It is no less the act of *Root*. Nor can it make any difference, that it was given at a time subsequent to the deed, as it is between the same parties, and relative to the same subject.

*Edwards, contra.*

The plaintiff shows by the certificates, that he has the rights of a proprietor; at least, he shows that he has the evidence of those rights which the defendants required in their advertisement. To oppose this, the defendants offer to prove, that the plaintiff with *Ledlie*, received these scrip not as his own, but to sell. To this the plaintiff objects, that he having produced the usual evidence of title, the evidence which the defendants required, it cannot in this way be resisted. If it could, these defendants could not make the objection. They have no claim by this receipt. The receipt is given to *Jacob Ogden*, to account with the *Gore Company*. The defendants have not shown, that they have the rights of the company, or have any authority to claim in their behalf. They, as individuals, have received money from the state, to pay over; and if the *Gore Company* have claims upon *Jesse Root*, or upon *Root* and *Ledlie*, they only are competent to assert them, and not the defendants. But what is this receipt? The plaintiff, on the

4th of *December*, 1796, is possessed of these scrip; and in *April*, 1797, the *Gore Company* take a receipt from *Root* and *Ledlie*, that they will sell these scrip, and account with the company. In this action, is *Jesse Root* bound to settle the accounts of *Root* and *Ledlie*, and the *Gore Company*? *Root* and *Ledlie* may have sold these scrip to the plaintiff, and may have accounted with the company. But *Jesse Root* could not expect to settle that account in this suit. *Root* and *Ledlie* being parties to that receipt, the claims of *Jesse Root* are not to be affected by it. The evidence, therefore, was properly rejected.

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By THE COURT.

A new trial is not to be granted.

NATHAN FOWLER and SAMUEL GREEN *against* SAMUEL CLARK.

WRIT of error.

This was an action, in common form, on a promissory note, made by *Fowler* and *Green* payable to *Clark*.

The defendants pleaded, that the note was given as an escrow to compel them to abide the award of *Benjamin Bull*, *William Durand* and *Henry Bull*, arbitrators between the plaintiff and the defendants; and that no award was ever made.

The replication alleged, that it was agreed in the submission, that *Clark* should deliver to the arbitrators a deed of a certain piece of land, conveying the same

Facts stated, by way of inducement to a material traverse, are not traversable; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement.

*Quære*, whether after a plea of *no award*, a rejoinder of a *revocation* is a departure?

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to *Green*, and also a deed of another piece of land conveying the same to *Fowler*, and that, on publishing their award, the arbitrators might, on certain conditions, deliver said deeds to the grantees, and also deliver the note on which, &c. endorsed down to such sum as they should find due, to the plaintiff. The replication then alleged, that the arbitrators made and published their award, endorsed down and delivered the note; also delivered said deeds to the grantees; and that *Green* accepted his deed.

To this there was a rejoinder, alleging a revocation of the powers of the arbitrators; and concluding with a traverse of the allegations, that the arbitrators endorsed down the note, that they delivered said deeds to the grantees, and that *Green* accepted his deed. The delivery of the note to the plaintiff was not traversed.

There was then a surrejoinder, taking issue on the facts traversed, without noticing the allegation as to a revocation.

The jury found the issue in the plaintiff's favour.

The defendants then moved in arrest, on the ground, that upon the whole record, judgment ought to be rendered in their favour, or a repleader ordered.

The *superior court* denied the motion, and gave judgment for the plaintiff; on which this writ of error is founded.

*Daggett* and *N. Smith*, in support of the judgment.

1. The averment of a revocation, be it inducement to a traverse, or what it may, is a manifest *departure* from the plea. This depends upon another point, viz.



does the plea of no award mean no award *in fact*, or no *legal* award? We contend that it means no award in fact. In support of this position, we rely upon the following authorities. The first is *Roberts v. Marriott*, 3 Lev. 300. "Debt on obligation, conditioned to perform an award, so that it be made and tendered at the house of J. S. such a day. The defendant pleads *no award*. The plaintiff replies, and shows an award, and assigns a breach. The defendant rejoins, that it was not tendered at the day. The plaintiff demurs: and for the defendant it was argued, that this was no departure; for it not being tendered, and the submission being conditional with an *ita quod*, it is no award. To which it was answered, that the plea of *no award* is intended of no award at all, either in fact or in law; but the rejoinder admits an award in fact, but that it is void in law for want of a tender; and so it is a departure. 2 Roll. Abr. 692. pl. 10. And of this opinion were the whole court, and gave judgment for the plaintiff."

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In 2 Saund. 189. the same case is reported, and the same decision had; and in a note to this case, the learned editor reports a case from *Keilway*, in which the same point was decided. "More said that he could not do otherwise than he had done; for when the plea was pleaded, the opinion of the court was, that though the arbitrator made an award before the day, but did not give any notice of it to the party, the award was void, to which the court agreed; and a void award and no award is the same thing; therefore he might, by way of rejoinder, well show, that the arbitrator did not give any notice to the defendant of the award, in which case the award is void, and so no award in law, and therefore no departure. But the court said, it was a clear departure notwithstanding this reason; for if the matter were so, the defendant ought to have shown it

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In *Morgan v. Man*, 1 Sid. 180. S. C. Sir T. Raym. 94. it was adjudged, "that where to debt on bond, the defendant, after praying oyer of the condition, which was for performance of an award, pleaded no award made; the plaintiff replied, and showed an award; the defendant rejoined, that other matters were referred, of which the arbitrators had taken no notice, and therefore it was no award; and thereupon the plaintiff demurred. The court adjudged, that the rejoinder was a departure from the plea; for the defendant ought to have pleaded this special matter in his plea at first." The same point was decided in *Harding v. Holmes*, 1 Wils. 122.

In *Præd v. The Duchess of Cumberland*, 4 Term Rep. 585. to an action of debt on an annuity bond, the defendant pleaded, that no such memorial of the bond as is required to be enrolled by the statute of 17 Geo. III. was enrolled, &c. before the commencement of the suit. The plaintiff replied, that a memorial of the bond was enrolled, which contained the day of the month, year, consideration, &c. The defendant rejoined, that true it was, the memorial of the bond was enrolled, but alleged that the memorial did not set forth the consideration truly, &c. The court were clearly of opinion that the rejoinder was a departure from the plea, and in giving their opinion say, "that the plea of no memorial enrolled, like the plea of no award, or no *capias ad satisfaciendum*, tenders issues *in fact*, and not *in law*." These are the words of Mr. Justice Buller, an able and accurate lawyer. This judgment was afterwards affirmed in the *Exchequer Chamber*. 2 H. Bla. 280.

In *Kyd on Awards*, 299, 300. it is said, "where the defendant pleads the common plea of *no award*, he can-

not in general, after the replication, rejoin any thing else than that there was *no such award*. If the award be void, he must demur; because a void award is no award, and the bond is not forfeited by non-performance. He must not rejoin, that the award is void, because that is a departure from his plea." The exceptions to this general rule are:

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First, where the submission is general of all matters in controversy, with a proviso that the award be made of the premises. The defendant, in such case, may plead that the arbitrators made no award of the premises; and if the award set forth in the replication do not comprehend all the subjects that were in controversy, he may rejoin that there were other things in controversy, of which the arbitrators had notice, and of which they made no award; concluding that therefore they made no award of the premises, which is so far from a departure from his plea, that it is a confirmation of it. *Kyd on Awards*, 300.

Secondly, if the award was made by an umpire, and the defendant had only pleaded that the arbitrators made no award, he may, on the umpirage being set forth, rejoin performance; for that does not contradict his plea. *Ibid*.

It was admitted on the argument in the court below, that if this rejoinder was a departure, the plaintiffs must have judgment. It is believed, that it is now proved, that a plea of *no award* intends no award *in fact*; and it follows, that an allegation in the rejoinder, that the defendant revoked, is a departure, and therefore required no answer.

2. A repleader never shall be granted, when the issue is found against the party tendering it.



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In *Webster v. Bannister*, Doug. 396. Mr. Justice *Buller* asked if this was not the rule; and said, he could find no case of an exception to it. Such an authority should have weight with the court, until the gentlemen opposed to us can show that it is not law. Is not the rule founded in good sense? The defendant says by traversing the delivery of the note, deeds, &c. that "I am willing to try your right to recover on this note, by the trial of those facts." Those facts, by the verdict, are found against him; and he *now* says, "I wish to try it on other facts." Surely, he may not thus trifle with the court, and his antagonist.

It is admitted by the defendant's counsel, that the facts traversed were material; and if found for the defendants, would have effectually barred the plaintiff of a recovery. But as they have been found against them, they wish to try the case on other facts. In short, the plain language of the defendants is, "we have rejoined double, that is, we have alleged a revocation which is a material fact, and have also denied material allegations in your replication; the material allegations are found against us by verdict; we wish now to try the fact of revocation." The plaintiff answers to this, "your request is unreasonable, and unsupported by the rules of pleading. You have confessedly made a double rejoinder, which must have been held insufficient on demurrer; because you had no right to put in issue two or more independent, distinct facts. We joined issue with you on facts admitted to be material. You have, therefore, tried your case on a material traverse, and have lost it. This is all that the law allows to any party; and your only complaint is, that you have not had what is never indulged to others, the right of trying your case on *several* independent, substantive, and distinct grounds." We apprehend, that no relief can be granted to the defendants, but on application for a new trial

bounded on their having missed their plea, for that they should have put in issue the fact of revocation. When such an application shall be made, the court will decide it on its merits, on principles applicable to new trials.

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There is one consideration that must settle this point, whether the rule laid down by Mr. Justice *Buller* be correct, or not: a repleader is never awarded in favour of a party tendering an issue, *which is material*, and which is found against him. There is not a shadow of support for the contrary position. The strongest case of a repleader to be found, is *Tryon v. Carter*, 2 *Str.* 994. where to a bond conditioned for payment of money on or before the 5th of *December*, the defendant pleads payment on the 5th of *December*, and plaintiff replies, and verdict for the plaintiff; there shall be a repleader, for it is an immaterial issue; and it not appearing but that the money was paid before the 5th of *December*. On this case it may be remarked, first, that the repleader was not ordered on motion of him who tendered the issue. The plaintiff traversed the payment on the 5th; and the verdict was in favour of him, who made the denial or traverse of the defendant's plea. Had it been in favour of the defendant, who accepted the traverse, the decision would have been for him. Secondly, whenever this case is cited, it is said, that if the issue had been in favour of the defendant, who accepted the traverse, no repleader would have been allowed. *Per Lord Mansfield*, 1 *Burr.* 302. &c.

3. The defendants have put in issue an acceptance of deeds from the plaintiff under this award, and in compliance therewith, and the issue is found against them; therefore, they are not at liberty to question its validity, or to say that they revoked the powers of the arbitrators.

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The principle that a subsequent ratification is equal to a prior authority, will not be questioned. There are many cases in which a party is estopped to allege *the truth*, and that by matters *in pais*, as well as by matters of record. *Com Dig. tit. Estoppel, (A. 3.)* A man is estopped to deny that *A. B.* is his tenant, *having accepted rent* from him. *Co. Litt. 352. a.* A wife brings dower and recovers; she shall be estopped afterwards to claim lands settled upon her for jointure. *4 Co. 5.* Again, in debt for rent, by lessor against lessee, the lessee cannot say, that the lessor had no interest in the tenements; because by accepting a lease, or paying rent, he admits the title. *Bull. N. P. 170. Cooke v. Loxley, 5 Term Rep. 4.* In ejectment by grantee against grantor, the defendant is estopped to say, that he had no title when he gave the deed. So the endorser of a note, in an action against him brought by the endorsee, cannot deny the execution of a note by the maker, but must pay it, if it is a forgery. *Lambert v. Park, 1 Salk. 127.* Again, a person will make a note his own, by admitting it due, though it were forged, or even by paying others similarly circumstanced. In *Barber v. Gingell, 3 Esp. 60.* Lord *Kenyon* ruled, that where the defendant had proved the bill in question a forgery, the plaintiff had done away that defence, by proving that he had in fact paid several bills in the same situation.

Now, let us apply these doctrines to this case. The plaintiff demands of the defendants to pay him a sum awarded to him by arbitrators. The defendants say, "the arbitrators made no award; we are not, therefore, liable." The plaintiff says, "they did make an award; and they awarded, that you should pay the note; and that I should give you a deed of certain lands. I made and delivered the deed; and you accepted it; and still you will not perform your part." The defendants answer, "we revoked the powers of the arbitrators." If



the rejoinder had stopped here, would it not have been insufficient, on the ground that it was incompetent for the defendants to aver this, after admitting that they had taken a deed under the award? So their counsel thought; and therefore added, in their rejoinder, to the allegation of revocation, a traverse of the delivery and acceptance of the deeds; and on this traverse, the facts in issue are found against them. On no principle, therefore, can they complain.

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If these observations are just, the defendants cannot have a replader, on another plain principle of law, viz. that where a verdict has decided the rights of parties, and the court can see how to render a judgment, it shall be rendered either for the plaintiff or defendant, as to law appertains, notwithstanding any informality. In *Rex v. Philips*, 1 Burr. 292. this principle is fully recognised in a great number of cases there cited; also in *Fitch v. Scott*, 1 Root, 351.

4. The allegation in this rejoinder that the defendants revoked, is to be entirely disregarded by the court, because it is mere *inducement* to the traverse. Here the question is, in what light an inducement to a traverse is to be considered, according to the established rules of pleading?

Judge *Swift*, in the second volume of his *System*, p. 219. says, "It is inconsistent to suppose, that the inducement to the traverse must contain facts that are traversable, when it is conceded that the party traversing does not rely upon the inducement, but upon the traverse. The parties cannot demur to an inducement for its insufficiency; because, if the traverse be taken to a material point, it is good. Nor can they traverse the inducement; because that would be a traverse upon a traverse. In all instances, where the

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traverse is properly taken, the opposite party must affirm over the same facts. If we cannot demur to, nor traverse an inducement, it is clear that it has *no legal effect*; and, if the party is bound to affirm over a material fact, when traversed, it is certain, that *he does not admit the truth of the facts stated in the inducement*. Upon these principles, I consider the inducement *as mere form for the purpose of introducing the traverse itself*; and whenever a party intends to deny a fact material, he may as well do it without as with an inducement.

If this opinion of Judge *Swift* be well founded, it is most apparent, that the case is with the plaintiff. But, it is said, that this opinion is erroneous. We admit, that there are cases, where the inducement *may* be traversed. There is no case, however, where it *must* be traversed. The *general rule* is, that it *cannot* be traversed. The exceptions to this general rule, as will be clearly shown, do not affect, in any degree, the present case. All our elementary writers lay down the rule, as Judge *Swift* has, that an inducement is not traversable, or in other words that there cannot be a traverse upon or after a traverse. The reason given must satisfy every lawyer, and every man of good discernment. If an inducement might be traversed, the pleadings might be protracted *in infinitum*. Now, the object of all pleadings is to bring up a point, on which the case *ought* to be decided; and the party is always at liberty to select such point. When he has selected it, and joined issue upon it, he must be concluded thereby, or no end would be put to the altercations of parties.

The exceptions to this rule will, at once, evince the perfect propriety of it, and show that the judgment of the court below in this case is correct. First, attend to the rule. "If there be a traverse of a point apt and ma-

terial to the plaintiff's title, he cannot refuse it, June, 1808. and tender another traverse." *Com. Dig. tit. Pleader*, FOWLER (G. 17.) "So a man cannot take a traverse upon V. CLARK. a traverse in any case, where the first traverse is material." *Ibid.* Now to the exceptions. "A traverse after a traverse may be allowed, as where the plaintiff alleges a trespass *in such a county*; the defendant pleads a concord for trespass in every *other county*, and traverses the county; the plaintiff may join issue on the county, or traverse the concord." *Co. Litt.* 282. b. "So in trespass on such a day, if the defendant pleads a license such a day, and traverses all days before, or since, the plaintiff may traverse the license." *Digby v. Fitzharbert*, *Hob.* 104. "So in all cases where the traverse in the bar takes away the *time* or *place* in the declaration, the plaintiff has his election to join issue on the traverse, or to traverse the inducement to the traverse alleged by the defendant. But when the inducement is made and concluded with a traverse of a title shown by the plaintiff, the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse." *Chichesley v. Thompson et al.* *Cro. Car.* 105. and *Stockman v. Hampton*, *Cro. Car.* 442. Here the rule and the exception are laid down with great precision.

If we advert to an established principle of law, viz. that *time* and *place*, in *transitory* actions, are immaterial, we are at once convinced of the reasonableness of this exception. Let us hear the remarks of Lord Coke, in his *Commentary upon Littleton*, p. 282. b. "In an action upon the case, the plaintiff declared for speaking of slanderous words, which is transitory, and laid the words to be spoken in *London*; the defendant pleaded a concord for speaking of words in all the counties of *England*, *saving in London*, and traversed the speaking of the words in *London*; the plaintiff, in his replication,



June, 1808. denied the concord; whereupon the defendant demurred; and judgment was given for the plaintiff. For  
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have been; and then averred, that the offering and tender mentioned in the defendant's plea at *New-York* with the offering and tender at *Philadelphia* were the same offering and tender mentioned in the declaration, and traversing that the offering and tender at *New-York* were the offering and tender in the declaration. The defendant then went to issue upon the fact, whether the plaintiffs offered and tendered the bank stock at the *United States Bank* in *Philadelphia*, as they had alleged in their replication. This issue was found in favour of the plaintiffs, and damages assessed. A motion was made to set aside this verdict, and enter up judgment for the defendant; for that it appeared from the whole record, that the declaration was falsified. The plaintiffs opposed this motion by saying, first, that this was a transitory action, and that the place was not material, until made so by the defendant's plea; and when so made, it was competent to allege the true place, and that such an allegation was no departure, nor was the declaration falsified: secondly, that it appeared on the whole record, that the defendant had violated his contract; that the plaintiffs had performed theirs; and that they, therefore, were entitled to retain their verdict. So both courts adjudged.

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The other exception to the rule, that there cannot be a traverse after a traverse, is where the first traverse is not to the point of the action: "As in waste for cutting down and *selling trees*; the defendant pleads that *he used them for repairs*, and traverses *the selling*; the plaintiff may waive this, and traverse *the using in repairs*; for the first point was not material to the action; it was surplusage in the declaration, and ought not to have been traversed, and the plaintiff might have demurred on the traverse." *Digby v. Fitzharbert*, *Hob.* 101. 104. cited *Com. Dig.* tit. *Pleader*, (G. 19.)

In the case before the court, neither time nor place

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is concerned; and the defendants, by their rejoinder, tender to the plaintiff an issue on a material point, and which, if found against him, would have been fatal to his case. By all the rules of pleading, then, the plaintiff was bound to accept this traverse; and it being found for him, he must have judgment.

We will now consider some objections offered by the defendants' counsel on the former argument. The case of *Richardson et al. v. The Mayor and Commonalty of Orford*, in the *Exchequer Chamber*, reported in 2 *H. Bla.* 182. was read as leaning against the doctrine for which we contend. It was an action of trespass, containing five counts, in two of which the plaintiffs alleged, that the defendants had fished in the several fisheries of the plaintiffs; in two other counts, the fishery was alleged to be the *free* fishery of the plaintiffs; and in the fifth count, the defendants were charged with taking the fish of the plaintiffs. The defendants pleaded, that the place where, &c. was an arm of the sea, &c. in which all the subjects of the realm have a right to fish, &c. and that the defendants, being subjects of the realm, fished, &c. as well they might. The replication stated, that the town of *Orford*, &c. was an ancient town, &c. and that *the Mayor and Commonalty of said town had the sole and exclusive right, &c. of fishing in the place alleged, &c. and had from beyond the memory of man, &c.* and the replication concluded with a traverse of that part of the plea, which set up *a right to fish, &c. in every subject of the realm.* The rejoinder, after stating matters by way of inducement, deserted the traverse offered, and concluded by traversing *the right of the Mayor and Commonalty of Orford immemorially to fish in the place, &c. in severalty.* The plaintiffs demurred specially, alleging for cause, that the defendants had not taken issue on a material traverse offered; but had gone away therefrom, and attempted to take issue on other facts stated in the replication. The court of *King's Bench*, as appears in 4 *Term*



*Rep.* 437. gave judgment, that the rejoinder of the defendants was insufficient, because the defendants should have accepted the traverse, which the plaintiffs offered, for that it was material, and would decide the rights of the parties. In the *Exchequer Chamber*, the judgment of the *King's Bench* was reversed; and *Eyre*, Ch. J. gives the following opinion: "From the moment it appeared, that upon the pleadings the plaintiffs might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment. That the first traverse was of the right of *all* the king's subjects to fish in the arm of the sea, stated by the defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken that if at the trial it had been proved that it was the separate right of others, and not of the plaintiffs, the issue must have been found for the plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. That an immaterial traverse might be passed over, and the matter of the inducement traversed; which had been properly done in this case by the defendants." This case, when examined, proves, that where the traverse offered is immaterial, the opposite party may leave it, and traverse the inducement. The only point of difference between the two courts was this—The judges of the *King's Bench* said, that the first traverse was *material*; and, therefore, the defendants were bound to accept it; and as they had not, their rejoinder was bad on special demurrer. The judges of the *Exchequer Chamber* said, that the traverse was an inference of law, and therefore bad; and also immaterial, and therefore would not decide the merits of the case. The defendants then might well pass over it, and traverse matter stated in the inducement; which is, as we have before stated, an exception to the

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June, 1803. general rule, that a traverse after a traverse is bad. How, then, does it bear on this case?

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But suppose the plaintiffs, instead of demurring to the defendants' rejoinder, had gone to issue on the traverse offered, to wit, the prescriptive right of the plaintiffs to the fishery, and the issue had been found for the plaintiffs, that they had such right, we would inquire whether the defendants could have a repleader? Most unquestionably not; for the case of the plaintiffs would have then been established, to wit, an exclusive right to the fishery; and yet, in the inducement to the traverse thus offered, they expressly allege a right, &c. in them as subjects of the realm to fish, &c. We wish for no better case to support our points than this; and we are confident, that no lawyer can read the case cited attentively, and not at once say, that if the plaintiffs, instead of demurring, had joined issue, and that issue had been found for them, they must have judgment, notwithstanding the *excellent* matter in the inducement.

In *Thrale et al. v. The Bishop of London*, 1 H. Bla. 376. Lord *Loughborough* makes the same remark, that an immaterial traverse may be passed by, and issue taken on a material fact. This is not denied. No additional support is derived from this case.

It is contended by the defendants' counsel, that though the issue might be considered as material without their inducement, yet that the fact of revocation rendered it immaterial. This is a novel idea; and it is to be expected, before it be assumed as a true position, that some authority to support it should be adduced. In *Vesey v. Harris et Ux. Cro. Car.* 328. a *scire facias* was brought against husband and wife, alleging that she, while sole, recovered a judgment against the plaintiff, and had execution for 26*l.* 13*s.* 6*d.* and obtained the

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money, of which they were now possessed, and had afterwards intermarried with the other defendant; and that the judgment had been since reversed; praying for restitution. The defendant pleaded, that after the reversal had, and before the purchase of this writ, he paid to the plaintiff the said 26l. 13s. 6d without this, that they are possessed of the said money as alleged. The plaintiff demurred specially. The court adjudged the plea bad, saying that though the payment was a good plea, yet being pleaded as inducement to an idle traverse, it was all bad. Here the court decided, that if the pleader alleges sufficient matter as inducement, and concludes with a traverse of an immaterial fact, it is bad pleading. How much stronger than this case! But to this novel doctrine, that a substantial allegation in the inducement renders the traverse immaterial, we answer, first, that if our third position be just, that a revocation cannot be alleged as a reason for not paying an award by him who has accepted a deed under the award, then, surely, the allegation is frivolous; for we presume it is not more substantial for being connected with a traverse of an allegation made by the plaintiff. Would not the rejoinder, then, have been insufficient in this case, had it only averred, by way of answer to our replication, that the defendant revoked? This point has already been considered at large. But, secondly, this argument, to wit, that the traverse is rendered immaterial by the fact alleged in the inducement, is founded on a *petitio principii*. We say, that it is never allowed, under any circumstances, to allege a fact in *that way*; and if it be so alleged, the opposite party cannot regard it; but *may*, and, in case it be connected with a material traverse, *must* take no notice of it. The defendants answer, "You must answer it, because it is well pleaded, and requires an answer," which is the very thing to be proved.



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It is finally said, that this rejoinder is only double, and is to be considered by the court precisely as though no traverse had been made. Here, it was asked in the court below, why the court should be puzzled with names? In this rejoinder there is neither inducement, nor denial, but it was the duty of the plaintiff either to have demurred for duplicity, or to have gone to issue on all the facts alleged, and denied by the defendants. This is breaking down the rules of pleading with a witness. Forms are important to preserve substance; and in courts of justice the forms of justice are eminently useful. The answer to a declaration is, and, we hope, will continue to be, a *plea*; the answer to a plea, a *replication*; and an *inducement* to a traverse has been for centuries, and shall be, an *inducement to a traverse*, and not a *general issue*, *special plea*, or *rebutter*. To say, that this matter alleged before a traverse taken is not inducement, for the sake of extricating a party from bad pleading, is to innovate where innovation is little to be expected, and less needed. The next step will be, that a traverse is inducement, and inducement a traverse; and, indeed, this position asserts, that *traversable* matter, and matter which *cannot* be traversed, are alike traversable; and, of course, that no land-mark in pleading remains. There is not a *dictum* to be found warranting the idea, that matter alleged as inducement to a traverse, with the facts traversed, are together to stand as a plea, replication, or rejoinder, and to be answered as such. Such a rule would, at a stroke, destroy a rule of first importance, that all pleadings shall be so formed as to bring the parties to a point of law, or fact, or both.

*Ingersoll and Staples, contra.*

In the view which we shall take of this case, we shall confine ourselves within narrow limits. The plain-

tiff brings his action on a promissory note. The defendants do not deny that they made such a note, but say it was delivered as an escrow to enforce the performance of an award which was never made. The plaintiff does not deny that the note was given for this purpose, but, according to the course of pleading in such cases, replies over an award, sets it out, and avers performance on his part. The defendants, in their rejoinder, allege a revocation; and moreover deny, by a technical traverse, the plaintiff's performance on his part. The plaintiff does not deny the revocation, but takes issue on the facts traversed by the defendants. Now, if we look through these altercations of the parties, and take that to be true which is averred by one party, and not denied by the other, we shall find the case decided, before we come to the issue which was ultimately joined. These facts are, concisely, that the defendants made the note; that they delivered it as an escrow to compel the performance of an award; and that before any award was made, they revoked the powers of the arbitrators. What the plaintiff did afterwards is of no consequence; and the issue was wholly immaterial. The only question, then, is, whether the facts are so stated in these pleadings, that the court can look at them? The court can clearly see that the note was made by the defendants; and that it was delivered conditionally; because these facts are distinctly alleged on the one hand, and not denied on the other. Why cannot the court as clearly see the other fact, viz. the fact of revocation? Surely, not because it is not distinctly alleged on the one hand, nor because it is denied on the other. The only reason, which has been suggested, is drawn from the *location* of the averment: it is placed *before a traverse*. Good sense discovers no reason here. One party makes a claim. The opposite party alleges substantial matter in avoidance, and then denies certain facts, which, if his allegation be true, are of no

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consequence. A common understanding does not perceive how this denial can render the preceding allegation inoperative.

But it is said, that in pleading there must not only be sufficient matter, but it must be deduced and expressed according to the forms of law. A party can no more prevail without observing the latter, than if he is deficient in the former.

After having been taught by authorities, which we could not but respect, that the rules of pleading are founded in sound sense and close logic, we shall be disposed to question the validity of any rules which are opposed to both. But we will inquire, whether there is any positive rule of law, that excused the plaintiff from answering our allegation, because it stood as inducement to a traverse. An inducement is said to be "the showing of cross matter contrary to the allegation of the adverse party." 5 *Bac. Abr.* 379. *Gwil.* edit. *Dyer*, 365. Such matter may be, and often has been, traversed. 1 *Tidd's Prac.* 635. 1 *H. Bla.* 407. The truth is, that an inducement to a traverse may, or may not be traversed, according to the matter which it contains. We understand the decision of the *Court of Exchequer Chamber* in *Richardson v. The Mayor and Commonalty of Orford*, in error, to have proceeded on this ground. If, then, this allegation was traversable, the plaintiff, by passing it by unanswered, admitted it. *Blake v. West et al.* 1 *Ld. Raym.* 504. *Nicholson v. Simpson*, 1 *Str.* 297. *Hudson v. Jones*, 1 *Salk.* 90. 5 *Bac. Abr.* 386. *Gwil.* edit. But, it is said, that this allegation is out of place on another ground, viz. that it is a *departure* from the plea. This is not very evident to "sound sense." The plea says, that there was no award made. The rejoinder *fortifies* this position, by averring, that the powers of the arbitrators were revoked, so that none could be made. The



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answer to this is a refinement, which, we presume, will never be adopted by our courts, viz. that when the defendant says, there was *no award*, he means something more than that there was none which the law recognises as an award—that there was no pretended award—nothing which any body ever called an award. If the party means so, it is difficult to see why he should not be left to say so. What is the meaning of *non est factum*, pleaded to a deed? Is it confined to this, that the party never put his hand and seal to such an instrument? Will not proof of a material alteration, of fraud, or of duress, support the plea? Is not the *legal effect* to be regarded, rather than the vague meaning which may be attached to the words in common parlance?

But admitting this allegation in the rejoinder to be a departure from the plea, still we contend, that the defect can be taken advantage of only upon demurrer. In *Praed v. The Dutchess of Cumberland*, 4 Term Rep. 585. the demurrer was *special*. In a note to *Richards et al. v. Hodges*, 2 Wms. Saund. 84. d. the position is laid down in express terms, that “the only mode of taking advantage of a departure is by demurrer.” After an issue formed, and a verdict, it is too late to take advantage of a departure. *Lee v. Raynes*, Sir T. Raym. 86.

BY THE COURT, unanimously.(a) A traverse properly taken to the material parts of a declaration, plea, replication, &c. either forms an issue, or, if it concludes with a verification, renders it necessary for the other party to affirm the facts traversed, and join issue upon them. The defendants below, in their rejoinder, traversed a material part of the plaintiff's replication. The plaintiff was bound to take issue upon it. Facts stated by way of inducement to a material traverse are not tra-

(a) BALDWIN, J. did not sit in this case.

June, 1808. **versable.** Of course, the party, by joining issue on the facts traversed, does not admit the truth of the inducement.

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Judgment affirmed.

**CATHARINE WALES, Administratrix of Rev. SAMUEL WALES, against ANNA WETMORE, ROBERT W. WETMORE, and VICTORY WETMORE, Administrators of Rev. IZRAHIAH WETMORE.**

If one receives money of another for a specific purpose, and fails to apply it, *assumpsit* will lie.

**MOTION for a new trial.**

This was an action of *assumpsit* counting upon a receipt of the defendants' intestate in the following words:

"*Milford, August 21st, 1780.*

"Received of Mr. *Samuel Wales* twenty-two pounds, seventeen shillings, lawful money, which I have laid out for land in the township of *Fairlee*, in company with captain *Robert Walker*, and captain *Joseph Walker*, and Mr. *David Judson* and myself, in a tract of twelve hundred acres of land, for which we gave two dollars *per* acre; and the said Mr. *Wales* is to have his proportion of land on a division, in proportion to the said sum of twenty-two pounds seventeen shillings, which he has advanced; as witness my hand.

*Izrahiah Wetmore.*"

The declaration negated the purchase of any lands by the defendants' intestate, and the repayment of the mo-

ney, and concluded with alleging an undertaking to re- June, 1808.  
pay the money and interest.

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The defendants pleaded the general issue; and, on the trial, objected to the plaintiff's evidence, on the ground, that it appeared by the receipt recited in the declaration, that Mr. *Wetmore* received the money from Mr. *Wales*, as his agent; and, therefore, the action ought to have been an action of account. But the court overruled the exception, and admitted the evidence; and in their charge to the jury, instructed them, that it was not necessary that the action should be account. The jury found for the plaintiff; whereupon the defendants moved for a new trial; which motion was reserved for the consideration of the nine judges.

*Ingersoll*, in support of the motion, insisted that, by the plaintiff's showing, Mr. *Wetmore* sustained the character of an agent; he was to purchase a distant tract of land, and transfer to Mr. *Wales* the part to which he should be entitled. This would be attended with trouble and expense, for which he might justly claim a compensation. In such case, *assumpsit* is an improper action; as it precludes the defendant from accounting on oath. *Collins v. Phelps*, lately decided in *Hartford county*,<sup>(a)</sup> and *Whitman v. Wadsworth*, 2 *Root*, 267. support this position.

*Daggett and Staples*, contra.

What was the object of this action? The repetition of money paid on a consideration which had failed. The form is appropriate; it is the one constantly used for this purpose.

(a) *Vide Appendix.*



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Account is never permitted, except where the defendant ought to be allowed to substantiate charges for disbursements and services, by his own oath. Mr. *Wetmore* was not entitled to any commissions; for he performed no services; he made no purchase, and conveyed no title.

Here was no promise to account. The undertaking, on the part of Mr. *Wetmore*, was of a different nature. Suppose the action had been account; and Mr. *Wetmore* had proved, that he had purchased the land according to the writing, and tendered to Mr. *Wales* a deed of his proportion. This would be a good defence; and yet it could not be shown under any plea to an action of account. This shows conclusively, that account is not adapted to the nature of the case.

In *Wetmore v. Woodbridge, Kirby*, 164. there was a promise to account, which was found by the jury; and yet the court held, that the plaintiff had his election to bring *assumpsit* or account. The case cited goes much further than is necessary for us.

BY THE COURT, unanimously. The only question reserved in this case is, whether, upon the facts alleged in the declaration, an action of *assumpsit* could be maintained? Not, whether an action of account would lie?

In many cases, the plaintiff may have his election; and may seek redress, either by an action of *assumpsit*, or of account.

If one receives money of another for an express purpose, and fails to apply it, *assumpsit* will lie.

In this case, the money was received for a right in certain lands in the township of *Fairlee*, in *Vermont*,

which Mr. *Wetmore* claimed to have purchased previous to the date of the receipt; yet it is averred, that no land had been purchased by him, nor any title offered to Mr. *Wales*. It appears, that the consideration wholly failed.

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If *assumpsit* would not lie, the defendants might have demurred to the declaration, as the receipt was spread upon the face of the record.

New trial not to be granted.

JOSIAH LANE *against* JOHN COOK, jun.

MOTION for a new trial.

This was an action of book debt.

The defendant pleaded the general issue. On the trial, the defendant exhibited his account, and offered evidence to support it; to which the defendant objected, on the ground that the account was *res adjudicata*. In support of his objection, the defendant produced a record of the city court of the city of *New-Haven*, in an action in which *Cook* was plaintiff, and *Lane* defendant. It was an action of book debt, in common form, demanding one hundred dollars. The plea was as follows: "*New-Haven* city, April 13th, 1806. The defendant in court defends, pleads and says, that he does not owe the plaintiff, in manner and form, as the plaintiff in his declaration hath alleged, but that the plaintiff owes him on book; and hereof puts himself on the court for trial." Issue was joined on this plea; and the court gave judgment for *Cook* to recover the whole of his

A record, that the defendant in an action of book debt appeared, and pleaded that he owed the plaintiff nothing, but that the plaintiff owed him, and judgment that the parties were fully heard thereon, is conclusive against him, in another action on book.

June, 1808. demand. That judgment was as follows: "At a city court holden within and for the city of *New-Haven*, in the county of *New-Haven*, on the second *Tuesday* of *May*, one thousand eight hundred and six. *John Cook*, jun of said city, plaintiff, *versus Josiah Lane*, of said city, defendant. In an action of debt on book, demanding one hundred dollars damages, as by writ of attachment, dated *April 11th*, 1806. The parties appeared, and were joined in an issue of *owe nothing*, to the court; as by the pleadings of the parties at large, under hand, on file. The court having fully heard the parties thereon, do find, that the defendant does owe the plaintiff in manner and form as the plaintiff in his declaration hath alleged; and thereupon it is considered, that the plaintiff recover of the defendant one hundred dollars debt, and his cost, taxed," &c.

The plaintiff, to repel the objection of the defendant, then stated, and offered to prove, that he was hindered from arriving in *New-Haven* at the time of the trial, and neglected to exhibit his account to be adjusted by said city court; so that said judgment was rendered wholly on the account of the then plaintiff.

The *superior court* ruled, that the defendant's objection was sufficient, holding that the judgment of the city court was conclusive upon the parties as to all matters on book subsisting between them at the date of the writ in that action. They therefore rejected the evidence offered by the plaintiff, both in support of his account, and relative to the former judgment; and the defendant obtained a verdict. For the rejection of this evidence, the plaintiff moved for a new trial; and the question was reserved for the opinion of the nine judges.



*Goddard*, in support of the motion, contended,

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1. That a judgment generally, is not conclusive upon all the matters, which *might* have been proved under the issue; but that an inquiry may be gone into, to show what matters did in fact come in controversy, and were adjudicated upon. In support of this position, he relied upon *Seddon et al. v. Tutop*, 6 Term Rep. 607.

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2. That in the case of *book debt*, an inquiry whether the defendant in the former action exhibited his account on the trial, is authorized by statute. *Tit. 25. c. 1. s. 4.*

*Ingersoll*, contra, insisted, that from the record of the city court, it appeared, that *Lane's* account was then in controversy between the parties, and adjudicated upon by the court. No inquiry can be gone into, which will *contradict* the record.

BY THE COURT. It appears by the record of the city court, that *Lane*, the defendant in that action, and plaintiff in this, appeared in the court to defend, and pleaded that he owed the plaintiff nothing by book, but that the plaintiff owed him. The necessary legal inference, therefore, is, that his book account was then submitted to the consideration and decision of that court. And the judgment states, that the court fully heard the parties in the premises; found that the defendant did owe; and thereupon did consider, &c.

This appearance and plea of *Lane*, and the judgment of the city court in that action, are conclusive upon the parties thereto, as to all matters on book subsisting between them at the date of the writ, on which that judgment was rendered. The evidence offered by the plaintiff, before the superior court, was, therefore, properly rejected.

New trial not to be granted.

June, 1805.

DAVID FANNING *against* JARED WILLCOX and LUKE PALMER.

An actual ouster, and adverse possession, continued uninterruptedly for fifteen years, will bar the original proprietor of his right of entry, whether the ouster and adverse possession were by the same person or persons, for the whole term, or by different persons, for different portions of it.

MOTION for a new trial.

This was an action of ejectment; to which the general issue was pleaded.

On the trial, the plaintiff claimed the land in question as devisee under the will of *Thomas Fanning*, deceased; to whom it had been appraised and set off under an execution against *Joseph Noyes*. It was admitted, that the plaintiff had a good and legal title, unless barred by the statute of limitations.

The defendants were in possession, as tenants under *Nathaniel Palmer*. It appeared, that after the levy of *Thomas Fanning's* execution, (a) *Noyes* continued in possession until within fifteen years of the time of bringing this action, but had gained no title. *Nathaniel Palmer*, having no title, then commenced an action of ejectment against *Noyes* for the land. *Noyes* suffered judgment to pass against him by default, and abandoned the land; upon which *Palmer* took possession, without the levy of an execution.

The court, in their charge to the jury, instructed them, that if they should find, that the plaintiff's record title was complete, and the defendants, or those under whom they claim, had no title of record, yet the law

(a) It is not expressly stated in the motion that the levy of *Fanning's* execution took place, and the adverse possession of *Noyes* commenced, more than fifteen years before the plaintiff brought his action; but this was the fact, and the case proceeds entirely upon the supposition of its existence. R.

was so, that if any other person had been in possession of the land, claiming adversely to the plaintiff's title, and the possession of such person, together with the possession of the defendants, and those under whom they claim, amounted to a period of more than fifteen years previous to the commencement of this action, during which the plaintiff was ousted of the possession, he was not entitled to recover. The jury found for the defendants; and the plaintiff moved for a new trial; which motion was reserved for the opinion of the nine judges.

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*Goddard*, in support of the motion, contended, that the plaintiff's record title being established, it was incumbent on the defendants to show, that they had since gained a title by possession. The law will not take away a title from one man, until it can vest it in another.

*Ingersoll*, contra, insisted, that as the plaintiff had not made entry into this land within fifteen years next after his right of entry accrued, his title was for ever gone, by the positive provisions of the statute;(a) and whether the defendants had any title, or not, was wholly immaterial.

BY THE COURT.(b) Actual ouster, and adverse possession, of any lands, tenements, or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided, the disseisin and adverse possession have been continued and uninterrupted; and provided, that the plaintiff does not come within any of the exceptions

(a) Stat. Conn. tit. 97. c. 3. s. 2.

(b) BRAINERD and GRISWOLD, Js. having been concerned as counsel in this cause, did not sit.



June, 1808. mentioned in the provisoes of the statute, extending the term of time, in which entry may be made.

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New trial not to be granted.

JOSEPH MUNSON *against* JABEZ MUNSON.

A distribution of the estate of a deceased person cannot be made by distributors appointed by the heirs and devisees.

WRIT of error.

A promise by one of the heirs to pay a sum of money to his co-heir, in compliance with the determination of such distributors, is without consideration, and void.

*Joseph Munson* brought an action of *assumpsit* against *Jabez Munson*, alleging that *Jabez Munson*, their father, made his will, and thereby gave his estate to his wife and children; that in order to have a just distribution thereof, according to the will, the heirs and devisees entered into an agreement signed by each, appointing *Caleb Alling* and *Joseph Dorman* to make such distribution, and bound themselves "to abide by, comply with, and perform, all the acts of said *Alling* and *Dorman*, and all their orders, awards, and decrees, in making and finishing a distribution of said estate, and that their distribution should be final upon all parties interested."

The declaration then stated, that *Alling* and *Dorman* accepted the trust, and soon afterwards made a just distribution according to the will, reduced the same to writing, and returned it to the court of probate, by whom it was accepted, approved, and recorded; and that the distributors awarded and decreed, in said distribution, that to make the parties interested equal, and to do justice according to the will, the defendant should pay to the plaintiff the sum of one hundred and one dollars of eighty-seven cents, the distributors finding, that the defendant had received so much out of the personal property belonging to said estate more than his share, and that the plaintiff wanted so much to make up his share.

The declaration concluded, by alleging that the defendant thereupon became liable to pay to the plaintiff said sum, and, in consideration thereof, assumed, &c.

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The defendant prayed oyer of the will; and then demurred.

The *superior court* adjudged the declaration insufficient.

*Staples*, for the plaintiff, contended, that judgment ought to have been in his favour,

1. Because it was competent for the parties to make a distribution of this estate in any manner they chose, provided that, when done, it should be *according to the will*. If they had made the distribution themselves, the property would have passed to the individuals respectively, to whom it should be allotted. That the distribution was made by persons appointed by them for that purpose, cannot make it less valid. Would not a court of chancery compel the parties to comply with the determination of these persons? They have acted in pursuance of powers with which they were fully vested, and with which it was competent for the parties to vest them.

2. Because, on this declaration, the plaintiff might have proved an *express* promise, either written or parol; and he now has a right to say, that the defendant *expressly promised* to pay him this sum of money, in consideration of the defendant's having received more than his share of the estate, and the plaintiff less than his share. *Atkins et Ux. v. Hill*, Cowp. 284. *Hawkes et Ux. v. Saunders*, Cowp. 289. This consideration is sufficient to support an express promise to pay. It certainly

June, 1803. is not weakened by the proceedings and determination of the distributors.

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The case can scarcely be made plainer by argument. *Jabez* has got a hundred dollars of personal property belonging to their father's estate more than he was entitled to have. He agrees with the rest of the heirs to submit it to *A.* and *B.*, to say to whom this sum should be paid. *A.* and *B.* decide in favour of *Joseph*; and *Jabez*, in consideration thereof, promises to pay it over to *Joseph*. Why shall he not be holden to perform his promise?

*N. Smith* and *Denison*, for the defendant.

The *assumpsit*, which is raised in this declaration, is founded on the idea that the settlement of the estate of *Jabez Munson*, deceased, here set forth, is good and valid. But this is a mode of settlement unknown to our law. It will not be claimed, that it has the sanction of immemorial usage, or of any rule of the common law. Does the *statute* authorize the heirs of an undivided estate to *refer* the distribution of it? There are two modes of distribution pointed out by the statute. First, by distributors appointed by the judge of probate. This is not a case of that description. Distributors appointed by the judge of probate could not make such an order; nor would such an order, if accepted and approved, be binding upon the persons against whom it was made. Secondly, by agreement among the parties themselves, under *hand* and *seal*, and *acknowledged*, and *recorded*. *Stat. Conn. tit. Estates Testate and Intestate, c. 1. s. 13.* But it does not appear from this record, that the order or determination of these distributors was either *sealed* or *acknowledged*, by the distributors themselves, or by the heirs. Nothing has been done, then, which is of



any validity, or from which the law will imply a promise. June, 1808.

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Can the plaintiff's claim be supported on the ground, that here was an arbitration? This was not a proper subject for the award of arbitrators. An award cannot settle intestate estates. It cannot convey a title to the smallest portion of real estate. However ample might have been the powers of the arbitrators, they could not, as such, vest a separate title in any of the heirs. There can be no liability to pay money in pursuance of an award, which cannot be carried into complete effect.

Why should this circuitous method be supported? It is loose and unsafe. No provision is made by law for recording the doings of arbitrators. The consequence of establishing this claim will be, that our titles to land, instead of being matters of record, will depend upon the awards of arbitrators.

Admit, for the purposes of this argument, that distributors appointed by the heirs *could* vest a title; it by no means would follow, that an order that one of the heirs should pay a sum of money to the other would be binding. An authority to *divide* does not include an authority to order that one of the heirs shall purchase the whole, or any part, of the estate of his co-heir. The powers of the distributors, as set forth in the declaration, were limited to a *distribution*. They were not authorized to make any order, which they might think fit.

It is said, by the plaintiff's counsel, that the promise set up in the declaration must now be taken to be an *express* promise. We admit it; but if the order of the distributors was not binding, there is no sufficient

June, 1803, *consideration* for that promise. This is the true ground,  
 TALCOTT on which the declaration is ill.  
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 GOODWIN.

By the Court, unanimously. The question that arises in this case is, whether the consideration alleged in the declaration is a good ground to support the promise of the defendant. This consideration is the title and right in fee, which the defendant is supposed to have acquired in the lands set out, and distributed to him, by the award of said arbitrators.

But the award conveyed no title. The transactions stated do not amount to a family settlement of the estate of said *Jabez Munson*, deceased. His estate remains yet unsettled, and, on application, is liable to be divided and distributed among the heirs or devisees, by freeholders appointed by the court of probate.

The consideration is wholly void, and not sufficient to support a promise, express or implied.

Judgment affirmed.

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WILLIAM TALCOTT, Assignee of THOMAS SANFORD, jun.  
 a Bankrupt, against JAMES GOODWIN, 2d.

The assignee of a bankrupt, under the late bankrupt law of the United States, must prove title, in an action of ejectment, like any other party, by producing the original deeds.

THIS was an action of ejectment.

The defendant pleaded the general issue. On the trial, the plaintiff, to show title in himself as assignee, after having proved the commission and assignment, offered in evidence a copy of a deed from the records of the town of *Hartford*, duly certified by the town clerk, from *George Bull* to the bankrupt, conveying the

demanded premises. The plaintiff, at the same time, proved, by one of the commissioners, and their secretary, that the original deed was not delivered to the commissioners by the bankrupt, nor to the plaintiff by the commissioners. It also appeared, that the commissioners never demanded it of the bankrupt. The defendant objected to the admission of the copy in evidence, for that the plaintiff was bound by law to produce the original. This objection prevailed; and the defendant obtained a verdict.

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The plaintiff moved for a new trial, on the ground that the court mistook the law in rejecting this evidence; which motion was reserved for the consideration of the nine judges.

*Goodrich and Dwight*, in support of the motion.

It is a part of this case, that the plaintiff was not *possessed* of the original deed at the time he offered the copy in evidence. The question will then be; whether it was within his *power*; for if it was neither within his possession nor power, it will be admitted that a certified copy was evidence.

By the 5th section of the late bankrupt law, it is made the duty of the commissioners to take all the estate, deeds, &c. of the bankrupt, *previous* to the appointment of any assignee. By the 18th section, the correspondent duty of the bankrupt is declared to deliver up his estate, deeds, &c. All this is to be done between the commissioners and the bankrupt; the assignee, of course, can have no concern in the transaction. By another section, the commissioners are directed to assign all the bankrupt's effects "aforesaid" to the assignee. He takes only what they give. The commissioners may examine the bankrupt upon oath, and if he



June, 1803. refuses to answer fully, may imprison him; but the assignee has no such authority.

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Further, the commissioners, by the 17th section of the bankrupt act, are authorized to make special assignments of property fraudulently conveyed by the bankrupt prior to his becoming bankrupt. This kind of property would rarely, if ever, be the subject of inquiry, at the time of surrendering. If it were, it is questionable whether the bankrupt could be compelled to accuse himself of fraud. But it would often not be discovered, until the commissioners had taken possession of the estate; perhaps not until after the bankrupt had obtained his certificate. At any rate, the commissioners would never demand, and, of course, the bankrupt would not deliver, deeds of land thus conveyed.

There is another consideration, which must be decisive of this case. The assignee comes in *by operation of law*; and therefore is not bound to have possession of the deeds. The *statute* transfers the property to the assignee for the benefit of the creditors. Should the bankrupt refuse to deliver up his notes and bonds, the assignee still could recover the debts; if the bankrupt should refuse to deliver up his deeds, the assignee, for the same reason, could recover his lands. *Gray v. Fielder*, Cro. Car. 209. *Stockman v. Hampton*, Cro. Car. 442. 1 *Cooke's B. L.* [17.] 13 *Eliz.* [24.] 1 *Jac. I.* [32.] 21 *Jac. I.* [35.] 5 *Geo. II.*

*Ingersoll* and *Daggett*, contra, insisted that the evidence offered was opposed to two established principles of law;

1. That the best evidence, which the nature of the case will allow, shall be required.

2. That the subscribing witnesses to an instrument shall be called.

They then went into a full examination of the provisions of the bankrupt law, particularly those in the 2d, 3d, 5th, 6th, 7th, 18th, 20th, 22d, and 36th sections, to show that no inconvenience would arise from a strict adherence to the general rules of evidence.

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BY THE COURT. It is a well known rule in real actions, that the plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's. When he claims by a deed of feoffment, it is necessary for him to produce on trial the original instrument, and prove the execution and recording in the manner required by law; unless he can show it has been lost or destroyed by time or accident, or that it is in the possession of the defendant, or some other person out of his reach and control. But when it becomes necessary to trace a title through sundry prior conveyances, then, as it has never been practised here for purchasers to take the title deeds, and as all deeds are required to be recorded, we have admitted copies from the records to be given in evidence. These are deemed *prima facie* evidence, and the party producing them is not bound to prove their execution. If the other party contests it, the burden of proof devolves on him.

In this case, the plaintiff stood in the place of the bankrupt, *Sanford*. He claimed by virtue of a general assignment of all his estate. To make out a title in himself, he must show a title in *Sanford*; and, of course, it was as essential to produce the original deed, and prove the execution in the same manner as if *Sanford* had been the plaintiff on the record. If the deed had been lost, or destroyed, or out of the power of the plaintiff, he might have resorted to secondary evidence. But as it does not appear but that it was in his power to have produced the original deed in court, it was not competent for him to resort to a copy.

New trial not to be granted.

June, 1808.

BENJAMIN SMITH and EBENEZER WILSON, Executors of  
SETH BIRD, deceased, *against* DAN BEACH.

A corrupt agreement, in which the minds of the parties meet, is necessary to constitute usury. Therefore, where more than lawful interest was reserved with the knowledge of the lender, but without the knowledge of the borrower, it was held, that the transaction was not usurious.

MOTION for a new trial.

This was an action on a promissory note, executed by the defendant, to *Seth Bird*, the plaintiffs' testator.

The defendant pleaded usury, alleging, in the usual form, a corrupt agreement.

On the trial, it appeared, that more than lawful interest was reserved in the note; but that the defendant did not know of such reservation, until some time after the note was executed, and delivered. The plaintiffs contended that, under these circumstances, the note was not usurious. But the court directed the jury, that if they found that *Bird*, the payee, knew of the illegal reservation, at the time of the execution and delivery, they must find the issue in favour of the defendant.

The jury found a verdict for the defendant accordingly; whereupon the plaintiffs moved for a new trial, which motion was reserved for the opinion of the nine judges.

*Gould*, in support of the motion. The statute, upon which the defendant's plea is founded, declares, that all securities made for the payment of money lent *upon or for usury*, whereby there shall be reserved above the rate of six dollars in the hundred, shall be void. (a) To bring this case within the statute, it must be shown, that there was a *loan upon usury*, as well as a reservation of more than six *per cent*. What is the precise mean-

(a) Stat. Conn. tit. 170. s. 2,



ing of the term *usury* the statute does not point out, but leaves it to be defined by the common law. This always speaks of usury as implying *a contract*. 2 *Bla. Com.* 454. 4 *Bla. Com.* 156. 5 *Bac. Abr.* 405. But a contract always supposes a mutual consent of the parties. In this case, the defendant did not, and could not, consent to the unlawful reservation, as he did not know that such reservation was made. To show, that the *payee* had knowledge of it, may conduce to show, that he acted *fraudulently* in the transaction; and such fraud may be a proper ground of relief in a court of chancery.

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If more than legal interest had been reserved *by mistake*, it clearly would not be usurious. This point has been settled by repeated decisions. *Nevison v. Whitley*, *Cro. Car.* 501. *Booth v. Cook*, *Freem.* 264. *pl.* 286. *Bush v. Buckingham*, 2 *Vent.* 83. But why has this class of cases been held not to be within the statutes against usury? Because *a corrupt agreement* was wanting.

So long as there was no corrupt agreement between the parties, the knowledge of the payee, or his private intentions, can have no effect in this case.

There must be the same corrupt agreement to constitute a usurious reservation as a usurious taking. But if one were to take more than lawful interest *by force*, it will not be contended, that he would thereby subject himself to the penalties of usury.

It is essential to the substance of the plea, that it allege *quod corrupte agreeatum fuit*. *Com. Dig.* tit. *Pleader*, (2 *W.* 23.) *Nevison v. Whitley*, *Cro. Car.* 501. This form of the plea may be seen in *Lilly's Ent.* 183, 184. *Cüft.* 182. 185. *Lib. Plac.* 146. *pl.* 71. *Id.* 156. *pl.* 99.

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But there is one consideration, which must be decisive. The issue in this case is, that it was *corruptly agreed*, &c. This issue could not be found for the defendant, upon the facts stated. The direction of the court to the jury, therefore, was erroneous.

*A. Smith, contra.*

The object of the statute, as appears from the very title, was to restrain excessive usury. The first section prohibits the taking of more than six *per cent. per annum* for giving day of payment. By the second section, securities, in which is included more than at the rate of six *per cent.* are declared to be void. Such is the security in this case. Here was a loan, a giving day of payment, and a reservation of more than lawful interest. What more was necessary to bring the case within the statute? It is claimed by the plaintiffs' counsel, that the defendant ought to have *known* that more than lawful interest was reserved. But it is to be remembered, that he was the *borrower*, and that the statute was made for his benefit and protection, and was designed to operate exclusively against the lender. If, out of regard to the borrower, the statute would render void a security given by him understandingly and voluntarily for the payment of unlawful interest, there can be no reason why a similar security, given ignorantly and undesignedly, should not be equally void. As to the lender, no favour ought to be shown towards him, on account of the borrower's ignorance. If he understood the nature of the transaction, it is sufficient at least *as against him*.

The case of *Bush v. Buckingham*, read by the plaintiffs' counsel, is not applicable to the present question. There the plaintiff did not know of the unlawful reservation. It was not made by his consent.

It is said, there must be a corrupt agreement. By this, however, we are not to understand, an agreement which is in itself immoral, or corrupt *in foro conscientiae*. It is in contemplation of law corrupt, when the statute is violated. It was proper for the court to leave it to the jury to decide, whether the reservation, which was admitted to be above the legal interest, was made with the knowledge and consent of the plaintiffs' testator; and if it was, it follows that it was by a corrupt agreement.

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By THE COURT, unanimously. A corrupt agreement is essential to constitute usury; and to form a corrupt agreement, as in all other contracts, the minds of the parties must meet. The assent of *Beach* was, therefore, as essential to the existence of a usurious agreement as that of *Bird*.

From these premises it follows, as an undeniable consequence, that there could be no corrupt agreement while either of the parties remained ignorant of the excessive reservation; and the jury ought to have been so instructed.

New trial to be granted.



June, 1808.

ROBERT BIRD, HENRY M. BIRD and BENJAMIN SAVAGE against JOSHUA HEMPSTEAD and JOHN I. CLARK.

### MOTION for a new trial.

Under the late bankrupt law of the United States, a right of action founded on a tort did not pass, by the general assignment of the bankrupt's estate, to the assignees.

The nature of this action, which has twice been before the *supreme court of errors*, is concisely stated, *ante*, vol. 2. p. 293. *Hempstead*, one of the defendants, had died since the commencement of the suit. On the reversal in 1806, the cause was remanded to the *superior court* next thereafter held in *New-London* county, where it was again tried. On that trial, the defendant

In an action of trespass for taking and detaining a ship, it was held, that the plaintiff was entitled to give in evidence a process in replevin by C. a third person, a replevin bond by D. and E., as sureties, and a judgment thereon in favour of the defendant, and to prove that he, the plaintiff, had indemnified those sureties, for the purpose of showing, that he became liable to the defendant for the amount of his claim against C.; and that this sum ought to be the rule of damages.

offered to prove, that since the first trial of this cause, *Robert Bird*, one of the plaintiffs, had become bankrupt, and had assigned his effects under a commission of bankrupt duly issued in the district of *New-York*. To the admission of this evidence the plaintiffs objected; and the court ruled it out.

In the progress of the trial, the plaintiffs offered in evidence the writ of replevin, and replevin bond, mentioned *ante*, vol. 2. p. 294.; also a writ, process and judgment in favour of the defendant, against *Gurdon I. Miller*, and his sureties, on said bond; and then offered to prove, that the plaintiffs had indemnified said sureties. This evidence was objected to by the defendant; but admitted by the court.

In the charge to the jury, the court did not instruct them, that said evidence was not to be considered as proof of special damage in the case; but instructed them, that the right of the plaintiffs to recover depended on the right of property.

The owner of personal property, though not in possession, may maintain *trespass* against a stranger.

The plaintiffs obtained a verdict. And the defendant moved for a new trial, on the ground that these decisions of the court, with regard to the evidence offered, and their direction to the jury, were erroneous. This motion being reserved for the opinion of the nine judges, was argued, at this term, by *Goodrich* and *Dana*, in support of it, and by *Daggett* and *Goddard*, against it.

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By THE COURT.(a) The first question arising in this case, is, whether the bankruptcy of one of the plaintiffs, and the assignment of his estate, under a commission of bankrupt, devested them of their right of action. By the act establishing a uniform system of bankruptcy, it is provided, "That the commissioners shall take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled; and that they shall assign it to such persons as the creditors shall choose their assignees." This was a right of action founded on a *tort*; and did not pass, by such assignment, to the assignees. They could not maintain an action, in their own names, for such injury done to the estate of the bankrupt. The plaintiffs, therefore, were not devested of their right of action.

The material question in the case is, whether it was competent for the plaintiffs to give in evidence the proceedings in the replevin, and that they indemnified the sureties in the bond, for the purpose of showing, that they became liable to the defendant for the amount of his claim against *Miller*; and that this sum ought to be the rule of damages.

It is a clear principle, that if one man wrongfully, and by force, take from another man his property, and com-

(a) BRAINERD and GRISWOLD, Js. having been concerned as counsel in this cause, did not sit.

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pel him to pay money to regain it, trespass will lie for the wrongful act of taking the property. By a parity of principle, if he compel him to give security for money, action of trespass will lie. If one man procure the estate of another to be wrongfully attached, as the property of a third person, and the owner, to regain it, pay or satisfy the claim for which it is attached, trespass will lie.

The case of *Shipwick v. Blanchard*, 6 Term Rep. 298. supports this doctrine. The defendant, as assignee of bankrupt, ordered the goods of the plaintiff to be seized and distrained for rent due to the bankrupt. The plaintiff, to redeem the goods, paid the sum claimed for the rent, and expenses; but the petitioning creditor's debt having accrued after the act of bankruptcy, the commission of bankruptcy was void; and the plaintiff brought an action of trover for the goods, which was held to lie. It is true, that the question made was, whether *trover* would lie; and it was taken for granted, that the defendant was *liable* for such wrongful distress. If trover would lie, it clearly follows that *trespass* would also lie. In *England*, a distress for rent is in the nature of a legal process; and if trespass will lie for goods redeemed from a wrongful distress, it will for goods redeemed from a wrongful attachment.

Hence, it follows, that if, in the case under consideration, the plaintiffs had paid the money, or given security to the defendant for his debt against *Miller*, for which the vessel was attached, in order to regain possession of it, they could have maintained trover or trespass against him for such wrongful attachment. The procuring of the bond on the replevin, and the indemnifying of the sureties by the plaintiffs, was, in effect, giving security to the defendant for the debt due to him from *Miller*; for they became liable to pay it. It



was, therefore, the same thing in judgment of law, as if they had paid him the money.

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It is said, that the plaintiffs are estopped by the averments in the replevin from saying, that this vessel was not the property of *Miller*; that these facts ought not to be given in evidence as a basis for the recovery of damages; and that it is improper and dangerous to permit the action of replevin to be used for such purposes.

In the writ of replevin, there is no acknowledgment by the plaintiffs, that the property of the vessel was in *Miller*. They are not parties to the record. The only act done by them is to procure the bond on the writ, and indemnify the bondsmen; and this cannot estop them from saying the vessel was their property, any more than if *Miller* had procured the vessel to have been replevied without their knowledge. In all cases where money is paid to redeem goods wrongfully taken, attached, or distrained, it is competent for the party to prove, that the money was paid to redeem the goods from a wrongful taking; and that it was not a voluntary payment of an acknowledged claim. There is no more impropriety, or inconsistency, in admitting the plaintiffs in this case to show, that the proceedings in replevin were for the purpose of redeeming property wrongfully attached, than there is to admit a party to prove the payment of money, or the giving of a note, for that purpose.

Nor does it appear that any inconvenience can result from such practice. Where the title to goods is contested, and they are attached for the debt of one, and claimed to be the property of another, there is no legal process, by which such claimant can regain possession: for replevin can be maintained only in the name of the defendant in the suit. The only legal remedy, in the

June, 1808. name of the owner, is by action of trespass, or trover; which leaves the property in the possession of the officer attaching it; and it may be held in the custody of the law, till the final trial of the suit on which it is attached. But, if it is permitted that the claimant (where the defendant in the suit on which the goods are attached consents) may, by replevin in his name, regain the goods, all the damage that arises from the detention is avoided. No case can exhibit this advantage in a more striking manner, than that under consideration. *Bird*, to secure a debt of ten thousand dollars, due from *Miller*, attached a vessel and cargo ready to sail, worth thirty thousand dollars, which was the property of *Bird, Savage & Co.* If this vessel had not been replevied by them, in the name of *Miller*, then *Clark* would have been liable for the value of the property, as well as damages for defeating the voyage; but by admitting the replevin, he will recover on the replevin bond the whole sum recovered against him in this action; so that he can try the question, whether the property of the vessel was in *Miller*, without any expense, save that of the cost of trial. For the proceedings in replevin are not admitted as a basis on which to recover damages, but to limit the extent, where the value of the property is more than the amount of the debt, for which it is attached. But, if the value of the property be less than the debt demanded, then the defendant will be entitled to recover the value only; and the replevin is given in evidence merely for the purpose of showing, that the plaintiff has regained his property in such manner as does not excuse the defendant from the injury done him by the wrongful attachment.

If the plaintiffs, instead of replevying the vessel, had given a receipt to the officer, with an engagement to have it forthcoming on the execution when demanded, and then had taken the possession again, it is evident, that

in an action of trespass for taking the vessel, they might have proved this fact, in order to show that they did not regain their property in such manner as to excuse the defendant from the trespass. There can be no difference in principle, between the proceeding to regain one's property, and the process by replevin.

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Another ground of the present motion is, that the court directed the jury, that it was a question of property only. The defendant urged, that the plaintiffs had only a mortgaged right to the vessel, and was not in actual possession; and, therefore, if he had the property, he could not maintain trespass, but trover only, on the principle laid down by Lord *Kenyon*, in *Ward v. Macauley*, 4 *Term Rep.* 489. that trespass is founded on possession, and trover on property; that where the plaintiff has not the possession, he cannot maintain trespass, but must bring trover. But Lord *Kenyon* afterwards retracted this doctrine in *Gordon v. Harper*, 7 *Term Rep.* 9. The true principle is laid down by *Williams*, in his notes to *Saunders's Reports*. Note (1) to *Wilbraham v. Snow*, 2 *Wms. Saund.* 47. a. In order to maintain trover, it is necessary, that the plaintiff should have either a special or absolute property in the goods which are the subject of the action. He who has the absolute or general property, may support this action, though he had never had the actual possession; for it is a rule of law, that the property of personal chattels draws to it the possession, so that the owner may bring either trespass, or trover, at his election, against a stranger who takes them away.

It appears, that the ship in question, for a valuable consideration, was assigned by *Miller* to the plaintiffs, by an instrument in the nature of a bottomry bond, granting them the exclusive right to her during a voyage from *New-York* to *New-London*, and thence to *London*.



June, 1808. The plaintiffs had a right of possession, if they had a right of property; and, of course, their right to recover depended on the question of property.

REGULA  
GENERALES.

New trial not to be granted.

### REGULA GENERALES.

1. IN all cases before the superior court, where the defendant pleads the general issue, and intends to rely upon a defence, which, by the rules of the common law, ought to have been spread upon the record, by special pleadings; and in all cases founded upon an express contract, where the defence proceeds upon the ground of the existence in fact of the contract between the parties, but attempts to avoid the effect of it, by matter arising at the time of entering into the contract, or subsequent thereto, he shall give notice in writing of such his intention, at the time when by the rule of the court, he is bound to plead, and state therein the ground of his defence; from which defence, so notified, the defendant shall not be at liberty to depart, on the trial, and insist upon another defence. This notice, however, shall not be construed to admit, as special pleadings would do, the truth of the facts alleged in the plaintiff's declaration.

2. All motions, and other matters, reserved, on the circuits, for argument before the nine judges, shall be entered in the docket of the *supreme court of errors*, at the next succeeding term, before the second opening of the court.

# CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURT

OF

THE UNITED STATES,

HOLDEN AT HARTFORD, WITHIN AND FOR THE

DISTRICT OF CONNECTICUT, SEPTEMBER, 1808.

PRESENT HON. { BROCKHOLST LIVINGSTON,  
Associate Justice of the *Supreme*  
*Court of the United States.*

HON. { PIERPONT EDWARDS,  
District Judge for the District  
of *Connecticut.*

RHINELANDER, HARTSHORNE and others *against* PELEG P. SANFORD and others. September, 1808.

BRISTOL moved *ore tenus* for the appointment of a guardian to *Peleg P. Sanford*, one of the defendants, who was a minor.

LIVINGSTON, J. This motion is too loose. Whenever there is an application for the appointment of a guardian, even *pro hac vice*, it must be by a petition in writing, therein naming the person proposed, and stating his consent to be appointed.

A motion for the appointment of a guardian to an infant party, must be in writing, and must state the name of the person proposed, and his consent to be appointed.

Motion denied.

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1808.

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NATHAN SMITH *against* JACOB BARKER.

An *affidavit* in support of a motion to put off a cause for the absence of a witness, cannot be explained by extrinsic matters.

GODDARD, in support of a motion for the continuance of this cause, read an *affidavit* of the absence of a witness.

*Daggett*, contra, contended, that there had been negligence in procuring the attendance of the witness.

*Goddard* was about to make some remarks in explanation; when he was interrupted by

LIVINGSTON, J. When an *affidavit* is relied upon, the court will not go out of it. I shall, therefore, decline hearing any *ore tenus* explanation.

The name of the witness must always be disclosed in the *affidavit*, unless there are circumstances to show that the party, without any fault of his, was unable to learn his name.

Hereafter, when a cause is ready for trial, no application for a continuance will be successful, unless upon an *affidavit* conformable to the *English* practice. His honour remarked upon the inconveniences of putting off a cause ready for trial, in this court; and said, the *English* courts, and the courts in those states which follow the *English* practice, were growing more strict upon this subject.



September,  
1808.

**BENJAMIN BISSELL and others against ELIHU HORTON.**

THIS was an action of ejectment for lands in *Hebron*, in the state of *Connecticut*, alleging that the defendant ousted the plaintiffs of the demanded premises eighteen months before the commencement of the action, and had ever since remained in possession.

In an action of ejectment for lands in *Connecticut*, of which the defendant had disseised the plaintiffs 18 months before, and continued in possession, part of the plaintiffs were described as citizens of *Vermont*, and part as citizens of *Connecticut*, and the defendant was described as a citizen of *New-York*, dwelling in *Connecticut*: Held that the plaintiffs were not citizens of *Vermont*, nor the defendant a citizen of *New-York*, within the constitution and laws of the *United States*; and that the cause, therefore, was not within the jurisdiction of this court.

*Dana* and *Gilbert*, of counsel for the defendant, moved to erase this cause from the docket, on the ground, that from the description of the parties, it did not appear to be within the jurisdiction of the court. The plaintiffs were described thus: "*Benjamin Bissell*, late of *Hebron*, in the county of *Tolland*, in the state of *Connecticut*, now of *Saint-Johnsbury*, in the county of *Caledonia*, in the state of *Vermont*, a citizen of the state of *Vermont*, *Abel Bissell*, *Hezekiah Bissell*, *Elijah House*, *Francis Norton*, *John Thompson Peters*, of said *Hebron*, and *Asa Willey*, late of said *Hebron*, now of *Ellington*, in the county of *Tolland* aforesaid, citizens of the state of *Connecticut*." The defendant was described as follows: "*Elihu Horton*, of *Greenfield*, in the county of *Saratoga*, in the state of *New-York*, a citizen of the state of *New-York*, now dwelling in said *Hebron*." To support the jurisdiction, it ought to appear, either that the plaintiffs are citizens of *Vermont*, and the defendant a citizen of *Connecticut*, or that the plaintiffs are citizens of *Connecticut*, and the defendant a citizen of *New-York*. The first part of the alternative is not true; for all the plaintiffs, except one, are described as residing in *Connecticut*, and are averred to be citizens of *Connecticut*. The second part of the alternative is equally groundless; for it is averred, that the defendant is now dwelling in *Hebron*, in this state.

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HORTON.

*J. T. Peters*, contra, insisted, that as the defendant was expressly averred to be a citizen of *New-York*, he must be so considered, notwithstanding his residence in *Hebron* at the time of commencing the suit. He might be transiently dwelling there, without any determination to remain there permanently. It will be admitted, that he is still a citizen of *New-York*, unless he has become a citizen of *Connecticut*; but a transient residence here will not make him such. The word "citizen," within the intent and meaning of the constitution and laws of the *United States*, in regard to this subject, has reference to such persons only as have the rights of freemen, and are eligible to civil offices, within the district where they dwell. But it does not appear, that the defendant has any such rights and qualifications in this state.

LIVINGSTON, J. The rights of suffrage and eligibility to office are of no weight in the decision of this point: it is to be determined on other grounds. The plaintiffs are partly in *Vermont*, and partly in *Connecticut*. They are not, therefore, citizens of *Vermont* within the constitution and laws of the *United States*. With regard to the defendant, it is admitted, that he now resides in *Connecticut*, and has resided here during the time in which he has been in possession of the demanded premises; which clearly evinces a determination in him to remain here permanently.

*Per Curiam*. Let the cause be erased from the docket.

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## UNITED STATES against JOSEPH PORTER.

THIS was an indictment charging, "That before, on, and ever since the first day of *February* last, the public highway from the city of *New-York*, on the road through *Danbury*, *Litchfield*, and *Farmington*, and from thence to *Hartford*, by force of the several acts of the congress of the *United States* relating to post-offices and post-roads, was made, and still is, a post-road designated for the transportation of the public mails of the *United States*; and during all the period from and after the first day of *December*, in the year 1806, until the first day of *April*, in the year 1807, certain persons were, in virtue of the provisions of the said several acts of the said congress of the *United States*, authorized, employed and bound by contracts lawfully made by and with the postmaster-general of the *United States*, to transport and carry the said public mails of the *United States* from the said city of *New-York* to the city of *Hartford*, and from thence back to said city of *New-York*, on the route through *Danbury*, *Litchfield*, and *Farmington*; that on the thirty-first day of *January* now last past, in a certain four-wheeled carriage, for that purpose provided, and drawn by four horses, they, the said persons so as aforesaid by the said postmaster-general authorized and employed, were, in compliance with and fulfilment of their said engagements, transporting a public mail of the *United States* from the city of *New-York* to said city of *Hartford*, one *Isaac Kellogg*, a mail carrier, lawfully employed, and sworn to a faithful discharge of his said duty as such, as the laws of the said *United States* require, then having the care and charge of the said mail, carriage and horses, so as aforesaid used and employed in the transportation of said public mail: that at *Farmington* aforesaid, on the 31st of *January*, and 1st

Where a party states a contract, which, from evidence exhibited on the trial, appears to have been in writing, he must either produce it, or show that it is not in his power to produce it; otherwise, no proof of its execution or contents will be received.

An allegation in an indictment, which is not impertinent or foreign to the cause, must be proved, though a prosecution for the same offence might be supported without such allegation.



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of *February*, now last past, *Joseph Porter* of *Farmington* aforesaid, being not ignorant of, but well knowing, all the facts herein before stated, with intent unlawfully and wilfully to obstruct, retard, hinder and stop the passage of said public mail of the *United States*, then and there, with force and arms, did seize and stop said horses, and carriage in which said mail was then deposited; and with like force and arms, violence and strong hand, did seize the said *Isaac Kellogg*, then having the care and charge of said public mail, transported as aforesaid, and then in the act of driving and guiding said horses, and transporting said mail in the public highway, and on said post-road, on the route aforesaid; and said driver, horses and carriage, with said public mail, did stop, and forcibly drag said mail-carrier from said carriage, and then, at *Farmington* aforesaid, him the said mail-carrier, with said public mail of the *United States*, and horses and carriage used in transporting the same, did knowingly and wilfully obstruct, stop, and detain, for a long time, to wit, for the space of more than fifteen hours; contrary to the form, force, and effect of the act of the congress of the *United States*, in such case made, and then in force, entitled *an act to establish the post-office of the United States.*" [*Stat. U. S.* vol. 4. p. 505.]

The defendant pleaded *not guilty*.

The District Attorney offered a witness to prove the contract with the postmaster-general for the transportation of the mail, stated in the indictment. He was sworn, and was about to testify to the terms of the contract, when

LIVINGSTON, J. inquired, if it was in writing?

The witness answered, yes.

*Daggett*, for the defendant, objected to any parol evidence of this contract, insisting that the writing itself ought to be produced.

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The District Attorney said, it was in the hands of one *Ely*, of *New-York*, who refused to give it up; and we could not compel him to produce it.

LIVINGSTON, J. said, Mr. Attorney had shown, that it could be produced; he had named the person who had it, and stated where he lived. Mr. Attorney ought to have compelled *Ely* to attend, and produce the contract. Nothing is clearer than that proof of the contents of a writing cannot be received, unless it be shown that it could not be produced.

*Per Curiam.* The evidence offered is inadmissible.

*Wolcott*, for the prosecution. We shall take this ground, that the allegation in the indictment of a contract with the postmaster-general is mere surplusage; and, consequently, that no proof of it is necessary. The words of the statute are "That if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence, pay a fine," &c. [Section 3. *Stat. U. S.* vol. 4. p. 506.] That the mail should be carried in pursuance of a contract with the postmaster-general is a qualification not found in the statute. The mail is, in fact, carried on some of the most important routes in the *United States*, without any previous contract. It is so carried between *Baltimore* and *Philadelphia*, and between the city of *Washington* and *New-Orleans*. There cannot be a doubt, whether if the mail be obstructed on these routes, the penalty shall accrue. If we prove all that is necessary to subject the

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defendant, there must be a verdict against him, whether other matters stated in the indictment be proved, or not.

*Daggett*, in reply. This allegation is not *impertinent* matter; it is, in no sense, *foreign* to the cause. The obstruction, contemplated by the statute, is of a mail carried by the direction, and under the authority, of the postmaster-general. The indictment sets forth the manner, in which such direction was given, in which such authority was derived. Now, though this allegation be *more particular* than it was necessary it should be, yet having been made, it must be proved. This is the rule even in civil cases. *Bristow v. Wright*, Doug. 665. It applies more strictly in criminal cases.

EDWARDS, J. was of opinion, that no prosecution for obstructing the passage of the mail could be supported, without showing a written contract with the postmaster-general.

LIVINGSTON, J. inclined to think, that an indictment might be so framed as to subject the defendant, without proof of a written contract; yet as this indictment states a contract, which is not *impertinent* or *foreign* to the cause, he was clearly of opinion that it ought to be proved. The court will be more strict, he added, in requiring proof of the matters alleged in a criminal than in a civil case.

The District Attorney rose, and said he would enter a *nolle prosequi*.

LIVINGSTON, J. observed, that the defendant was entitled to a verdict of acquittal, if he wished it.

The defendant's counsel said, he wished for a verdict.



LIVINGSTON, J. then addressed the jury thus: No evidence at all being adduced against the defendant, it will be your duty, without leaving your seats, to find a verdict of *not guilty*.

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The jury immediately found a verdict accordingly.

*The District Attorney and Wolcott*, for the prosecution.

*Goodrich, Daggett and Dwight*, for the defendant.

#### TIMOTHY LESTER *against* FREDERICK STANLEY.

AFTER this case had been committed to the jury, and they were about to retire, LIVINGSTON, J. remarked, that he understood it had sometimes been the practice with juries in this state to separate while they had a case under consideration. The rule of the common law requires them to be kept together until they have agreed on a verdict; and on looking at the statute, we do not perceive that that varies it. The statute, indeed, appears to have been made in affirmance of the common law. The words are explicit: "And when the court have committed any case to the consideration of the jury, the jury shall be confined, under the custody of an officer appointed by the court, until they are agreed on a verdict."<sup>(a)</sup> If they separate before, and afterwards return a verdict, it will be set aside.

(a) *Tit. 6. ch. 1. s. 11.* This clause was passed as early, at least, as 1792; for it appears in the edition of the statutes published that year, and has not since undergone the slightest variation. The courts, for many years afterwards, were astute to enforce a compliance with the injunction it contains. In the case of *Cyprian Nicolls v. Joseph Whi-*

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ting, before the *superior court* in *Hartford* county, *September term*, 1711, the parties having been heard, and the issue committed to the jury, in the evening, *Richard Skinner*, a constable and officer of the court, was charged to go out with them, and attend them under their confinement, until they should have agreed on their verdict. The court then adjourned until the next morning; when the officer came into court, and gave information, that the jury, on the preceding evening, before they had agreed on any verdict, broke loose from their confinement, or, in other words, went out of the room to which he had conducted them, each one where he pleased. Upon which, the officer was ordered to command their attendance in court forthwith. They accordingly appeared, acknowledged the fact, and offered their several excuses. Some of them said, they thought it their duty to stay until they were agreed, and were willing to do so, but their fellows left them. Others alleged the carelessness of the officer as a palliation of their offence. The result was as follows, which I choose to give in the words of the record:

“The court having considered this matter, the disorder of the jury in the liberty they have taken to scatter and disperse before they had agreed on any verdict, *which is directly contrary to the law, and a great prejudice to the administration of justice in many respects*, are unanimously of opinion not to receive any verdict made after the separation, either while they are so separate, or whensoever they can convene again. It is, therefore, resolved, that the money they received of the plaintiff be returned to the plaintiff; which was accordingly done in court. And resolved, that this action be continued to the next *superior court* to be holden in *Hartford*, the third *Tuesday* in *March* next, where it shall have a trial.” R.

September,  
1808.GRANT COTTLE *against* STEPHEN PAYNE.

THIS was an action of debt on bond, dated the 17th of April, 1780; the condition of which was, that *Payne* should carry on the business of distilling brandy from cider, and should continue to do so for seven years and three months from the date of the bond, and should keep an exact account, during that term, of all brandy or other spirits distilled from cider by him, or on his account, and should deliver to *Cottle*, when demanded, one tenth part of all such brandy or other spirits distilled from cider, free from expenses. The declaration averred that *Payne* did carry on the business for the term above specified, but kept no account, and had delivered no brandy or other spirits. A special demand was alleged on the 20th of June, 1806. The action was commenced on the 10th of June, 1807.

The condition of a bond being that the defendant should carry on the business of distilling cider brandy for seven years and three months, and keep an exact account of the quantity distilled, and deliver to the plaintiff, when demanded, one tenth part thereof, and it appearing, that the defendant did carry on said business, but kept no account and delivered nothing to the plaintiff; it was held, that the plaintiff could have no right of action on the bond until the end of said term.

The defendant pleaded *full payment*. This plea was traversed, and issue joined thereon.

The counsel for the defendant stated, that they should rely upon the lapse of time in support of the plea. By our statute of limitations, no action can be sustained on any bond, bill, or note, for the payment of money only, unless brought within seventeen years;(a) but as this bond was given for the performance of certain collateral acts, the statute does not attach upon it. The length

Payment of a bond will not be presumed from lapse of time alone within a

shorter period than twenty years.

But where the demand is a stale one, the plaintiff will be held to strict proof of the amount of damages, which he is entitled to recover.

The court, in the exercise of their discretion, will not tax costs against a prevailing plaintiff, except where he must have known that he was not entitled to recover 500 dollars.

(a) *Stat. Conn.* tit. 101. c. 1. s. 3



September, 1808. of time in this case is such, that payment is to be presumed at common law.

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The counsel for the plaintiff then introduced proof of the situation and circumstances of the parties to repel the presumption arising from lapse of time. It appeared, that the plaintiff was a poor man; that soon after the execution of the bond, he went out of the state, and was absent several years; that when he returned, the defendant did not know him, at first, though on hearing his name, he recollected him. The defendant was a man of large property. A special demand was proved as stated in the declaration.

As to the amount of damages, it was proved, that the defendant had carried on the business of distilling cider brandy for several years; but no specific quantity was proved to have been distilled, except in one year. It was shown, on the other hand, that during some part of the period in question, there was no cider to be had.

*T. S. Williams* and *Trumbull*, for the plaintiff, contended,

1. That to raise the presumption that a bond has been paid, there must be a lapse of the full period of twenty years from its becoming forfeited, unless there be other circumstances which do not appear in this case. *Colsell et al. v. Budd et al.* 1 *Campb.* 27.

2. That this bond did not become forfeited until the expiration of seven years and three months from the date; and from that time until the demand was less than nineteen years, and less than twenty years until the commencement of the action.

3. That the lapse of even twenty years affords only a presumption of payment, that may be repelled; which,

in this case, has been done, by showing the plaintiff's absence from the state, and his inability, from that circumstance, and his poverty, to institute and carry on a suit. Very slight evidence is sufficient for this purpose. *Peake's Ev.* 25. 3d Lond. edit.

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*Daggett and Goddard*, for the defendant, contended,

1. That in *England*, the period of time within which a bond shall be presumed to be satisfied is not invariably fixed at twenty years, but may be eighteen or nineteen years. *Oswald et al v. Legh*, 1 Term Rep. 272.

2. That by the terms of the condition, the defendant was to keep an exact account of the brandy distilled in each year. But he kept no account whatever. The condition was therefore broken, and the bond forfeited, at the end of the first year; which was more than twenty-five years before the commencement of the action.

3. That from the situation and circumstances of the parties, which had been proved, the presumption of payment was rather strengthened than rebutted. The defendant was a man of property, and abundantly able to pay. If the plaintiff was poor, he stood in greater need of his money, and was more likely to call for it.

4. That in this state, payment ought to be presumed after the lapse of seventeen years, in analogy to cases within the statute. Thus, it has been held, that an equity of redemption shall be barred after *fifteen* years' possession by the mortgagee, in analogy to the statute limiting the right of entry into lands. *Smith v. Skinner*, 1 Day, 124.

LIVINGSTON, J. This is an action of debt on bond, the condition of which is, that the defendant should distil

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cider brandy, and keep an account thereof, for seven years and three months, and deliver one tenth part thereof to the plaintiff. The defendant pleads payment generally; and relies altogether upon the lapse of time since the date of the bond.

In *England*, payment is presumed in twenty years; but this rule is controlled by courts of justice, where the presumption of payment is opposed by other circumstances. But in *Connecticut*, as the legislature have acted on this subject, and fixed a term after which bonds of a certain description shall not be enforced, it deserves serious consideration, whether the rule is to be extended to cases not within the statute. Upon this point, however, the court deem it unnecessary to express an opinion. For in our view of the case, the plaintiff had no right of action for his part of the brandy distilled, until the expiration of the term of seven years and three months, which was in *July*, 1787; though, had the defendant distilled no brandy at all, perhaps the plaintiff might have sustained an action at the end of the first year, as such neglect would have been a breach of the condition.

But if twenty years had elapsed since the cause of action accrued, we think the circumstances disclosed by the plaintiff are such as to remove any presumption of payment. [Here his honour commented minutely upon the evidence.]

Though the plaintiff, upon strict principles of law, is entitled to recover, it is difficult to estimate the damages. The demand is, indeed, a stale one. The plaintiff calls upon the defendant after a great lapse of time, for an account of the brandy he has made; yet it cannot be expected, that the defendant should have kept such an account until this time. No inference is to be made against



him for not producing it now. He had good reason to believe he never should be called upon. He would have been justified even had he destroyed it. Under such circumstances, it is incumbent upon the plaintiff to prove the quantity distilled. During one year, the plaintiff has furnished some *data*, from which an estimate may be made; in no other year is there any. The jury have no right to supply this want of proof by conjecture; or to calculate that he distilled as much in other years as in this; especially when it appears, that in some of these years there was no cider.

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*Daggett* inquired, whether the rule of damages should be the value of the brandy at the time of the demand, or at the time the right of action accrued?

*Per Curiam.* The brandy was to be delivered *on demand*. The value at the time of the demand, therefore, is to furnish the rule.

Verdict for the plaintiff for 69 dollars and 21 cents.

*Daggett* moved, that costs be allowed the defendant, under the 20th section of the first judiciary act. [*Stat. U. S.* vol. 1. p. 61.]

*Per Curiam.* The court will not exercise their discretion to tax costs against a prevailing plaintiff, except where he has knowingly brought forward an unfounded claim, or, in other words, where he must have known that he was not entitled to 500 dollars damages. In this case, the plaintiff might naturally and fairly suppose he was entitled to recover more than 500 dollars.

Motion denied.

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CHARLES MICHAELSON *against* ABEL DENISON and  
others.

The courts of the *United States* will not hold jurisdiction of a case, on the ground that one of the parties is an *alien*, unless he is stated to be such in express terms.

The master of a vessel has a right during the voyage to punish his mariners, by corporal chastisement, for disobedience to any of his reasonable commands, & for inscience, and other offences. A  
amendment, when allowed.

THIS was an action of assault and battery.

After the declaration was read, LIVINGSTON, J. inquired on what ground the cause was brought before this court? Was it because the plaintiff was an *alien*? He was not so described in the declaration. The description was, "*Charles Michaelson, of Bass End, in the Island of St. Croix, a foreign subject, viz. a subject of the King of Sweden.*" By the constitution of the *United States*, the judicial power may extend to cases between citizens of a state and foreign subjects; but congress, in the provision of the judiciary act under that clause, have restricted it to cases in which "an alien is a party." He must be stated to be an alien in express terms. It is not sufficient that the description be such as to imply it. This court will take nothing by implication. Besides, it is a *non sequitur* that because a man is a subject of a foreign power, he is an alien: he may be at the same time a naturalized citizen of this state.

*Staples*, for the plaintiff, moved for leave to amend.

LIVINGSTON, J. at first, said, he did not see how a court not having jurisdiction could make any order in the cause. But upon its being stated, that an amendment had been allowed, at the last term, under similar circumstances, he remarked, that the court had not committed itself on the point; and, after a short consultation between the judges, the motion was granted, upon payment of costs.

On the trial it appeared, that *Denison*, one of the defendants, was the master of a vessel, and the plaintiff his mariner; and that the beating complained of consisted in the punishment inflicted by the former upon the latter, for disobedience of orders, insolent language, and personal violence.

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The plaintiff's counsel contended, that the master has no right to inflict corporal punishment for insolent language; nor for disobedience to orders, not relating immediately to the management of the vessel; nor, indeed, for *past* offences of any kind.

LIVINGSTON, J. in summing up, after taking notice of the weapon, which was not dangerous, the mode of punishment, which was not unusual, and the degree, which, however severe, was less than sufficient to reduce the plaintiff to submission, recognised the right of the master, during the voyage, to correct a mariner for disobedience to any reasonable commands, and for insolence, and other offences. The punishment, in its nature, is not limited to confinement, corporal chastisement being often necessary and proper; and, as to its extent, depends upon the circumstances of the case, the aggravation of the offence, or the continuance of the disobedience. This is a salutary authority, and ought to be maintained. Without it, it would be impossible to navigate our vessels.

Verdict for the defendants.

*Staples and Wales*, for the plaintiff.

*Ingersoll and N. Smith*, for the defendants.



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UNITED STATES *against* The Brig JAMES WELLS  
and Cargo.

APPEAL from the District Court.

The home-ward bound cargo of a vessel having proceeded to a foreign port in contravention of the act of congress of the 9th of January, 1808, supplementary to the general embargo act, is not liable to condemnation.

*Semb.* On a libel against the vessel for having thus proceeded, necessity arising from stress of weather, and the condition of the vessel, is no defence.

This was a libel founded on an alleged violation of the act of congress, approved the 9th of January, 1808, supplementary to the general act laying an embargo on all ships and vessels in the ports and harbours of the *United States*. The brig, of which *Stephen Griffiths* was claimant, was charged with proceeding to a foreign port or place, contrary to the provisions of said acts, and was condemned by the decree of the *District Court*. The cargo, of which the claimants were, *Jesse Hurd* of 80 puncheons of rum, *N. G. Rutgers* and *B. Seaman* of 326 bags of coffee, and *J. H. Rawlins & Co.* of 47 hogsheads and 14 barrels of sugar, and 5 hogsheads of rum was restored.

On the opening the cause, it appeared that the cargo libelled was the *return cargo* of the vessel from the *West Indies*.

*Daggett*, for the claimants, contended, that the embargo law did not authorize a condemnation of this property. Though the vessel went out in violation of the embargo, the claimants are entitled to a restoration of the *return cargo*.

*Wolcott*, contra.

LIVINGSTON, J. I have a strong impression, that the provisions of the act apply only to the cargo carried out. In a case like this, nothing is to be taken against the claimants by implication. The most express words would

be necessary to include the homeward-bound cargo. But congress have said nothing about it. We cannot supply any omission. The intention of the act was to prevent *exportation*. I am ready to say, that those parts of the decree restoring the cargo ought to be affirmed. Proceed to the vessel.

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The cause was conducted by the *District Attorney* and *Wolcott*, on the part of the *United States*; and by *Daggett* and *Bristol*, for the claimants. The evidence, so far as it is material to the present purpose, is recapitulated in the opinion of the court.

LIVINGSTON, J. This is a libel against the Brig *James Wells*, for proceeding to a foreign port, in contravention of an act of congress. Admitting the fact, the claimant interposes a plea of necessity; and contends, that although he may have violated the letter, he is not within the spirit and meaning of the law. Whether such matter can form a good defence here, is a question of considerable magnitude. To interpret a statute by its equity, or to say cases are without its spirit, although within its express letter, is, at all times, a delicate and difficult office. It is making, instead of expounding, laws. It often sets in array against the rigorous provisions of an act, the feelings of a single judge, who may not always have firmness enough to enforce them, if he be at liberty to mitigate their severity when they may be supposed to bear hard upon a particular case. He, besides, destroys that certainty in laws, which is a property so much desired, and must ever constitute one of their chief excellences. Even when this mode of interpretation may be indulged, it should be strictly confined to cases, which could not, from their nature, or the infrequency of them, be supposed to have been foreseen by the legislature. But when the necessity, or *vis major*, which is relied on, arises from circumstances, which were too obvious to have escaped

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the most ordinary capacity, but which, notwithstanding, are not found to form an exception from the general provisions of the law, a court may perhaps say *per quam durum, sit ita lex scripta est*. When to this is added, that another tribunal is erected, and referred to, by these very laws, invested with full power to relieve in cases of accident, &c. unintentional and innocent infractions, it can hardly be doubted, but that the courts of the *United States* are designedly excluded, in all cases of this nature, from every equity of interpretation whatever, and that, for a mitigation of their rigour, recourse must be had elsewhere.

Without, however, deciding how far a defence of this nature be admissible, where the act is silent as to any exception, the court will proceed to examine whether, in point of fact, the claim is supported. A more unpleasant office cannot devolve on a judge, than to be called on to determine both the law and the fact, in a penal suit between the government and a fellow citizen. But whatever his feelings, as an individual, may be, and of these I should never wish to divest myself, he must not lose sight of those solemn sanctions he is under, to administer with strict impartiality the laws of his country. In these, every man has an interest; and to permit those who violate them, to pass with impunity, is an injury to such, who, from principle, or from any other motive, make them the rule of their conduct.

The fact alleged in the libel being admitted, it will not be denied that the necessity on which the claim is founded, should be made out in a manner to leave no reasonable doubt, that it produced the violation complained of. The *onus* lying on the claimant, his proof should be strong and satisfactory. If any thing short of this be admitted, laws, however salutary, may be easily transgressed, and their penalties avoided.



This vessel sailed from *New-York*, on the 26th of September, 1808. February, of the present year, bound on a voyage to *St. Mary's* in *Georgia*. She was new, and without encountering any extraordinary bad weather, or meeting with any accident, we find her in a very few days, bearing away for the *West Indies*. For this conduct, no other reason is assigned but her leaky condition. Of this fact there is probably not much doubt; but that the danger arising from this circumstance was so imminent as to justify the act, is not so clearly established. It is true, that those on board must, *primâ facie*, be the best judges of the necessity, which may exist for changing the course of a voyage; and where no circumstances arise to impeach their testimony, they will be entitled to, and receive, full credit. But where every one of the parties may possibly be implicated in heavy penalties, it cannot be regarded as a want of charity to listen to their allegations with some caution. The master, it is concluded, is in this predicament; and it may well be doubted, whether all the other hands are not subject to the same penalties. If so, a very strong inducement existed in them all to give a high colouring to the transaction. But without detracting from their credit, on account of their participation in it, and their possible liability, it is not easy to believe, that on account of the leak, which they describe, a real necessity intervened for leaving the continent. Vessels in a more leaky condition than this one is described to have been in, have sometimes traversed the ocean, encountered considerable storms, and arrived in safety. There is too much reason, therefore, to think, that unless some strong temptation to depart from the tract of the original voyage had presented itself, more serious and successful efforts would have been made to reach *St. Mary's*. This surmise is much strengthened by the voyages performed by other vessels, at the same season of the year, and on parts of the ocean not very distant from this brig. Neither has it escaped

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the attention of the court, that after bearing away, the winds and weather, for a long time, were very favourable to have made an attempt to reach the destined port; for, whatever necessity may have produced, at the time a determination to go to the *West Indies*, if a reasonable prospect, such as moderate weather and favourable winds shortly after presented, of reaching the continent in safety, it ought to have been embraced; and if the cargo were found to be greater than the vessel could bear, there can be no hesitation in saying that part of it ought to have been sacrificed, if not the whole, in preference to landing it in a foreign country in direct violation of a public law, which could have been done without forfeiting the penalty of the bond which had been given to land it in the *United States*. This is an argument which was not urged by the counsel for the *United States*, but has considerable influence with me, in the judgment I am about to give. It is not pretended, that this vessel, if relieved of part, or the whole of her cargo, might not have returned to the *United States*. The underwriters, if insurance had been made to *St. Mary's*, would have been liable; and, if uninsured, the owner should have borne the loss himself rather than have gone to a foreign port. If this view of the subject be correct, there is an end of every justification arising from necessity. The carrying of the cargo to *St. Bartholomews* then becomes a *voluntary* act, which nothing could justify, but being driven there by a sudden and severe tempest, which did not leave time or opportunity to throw it into the sea.

But if this were not a duty, there are other circumstances which render it difficult to believe, that this was not a concerted plan to evade the embargo laws. There is no evidence to show what was the value of flour at *St. Mary's*. It is a fair inference, therefore, that the cargo was chosen for a *West India* market, where the embargo

would necessarily produce a scarcity of that article. We also find the owner on board as supercargo, which is not very usual in coasting voyages. He carried with him, also, notes payable in the *West Indies*; and although these may have been duplicates, it is not very customary, whatever may be the practice on land, to take such papers to sea. Nor is it very conclusively made out, that there was a necessity to dispose of the cargo at *Gustavia*; and although the sale at that port constitutes no part of the present offence, it is some evidence of the *quo animo*; for if repairs had been the only object of going there, the cargo would have been retained, and brought back, unless prevented by some compulsion, or force, on the part of government. It is, also, impossible to evade the very forcible circumstance of the *holes* which were bored in this vessel. On this subject, as well as on every other, the court has listened with great pleasure to the very ingenious remarks of the claimants' counsel; and although it felt desirous, that the impressions which were unavoidably made, when this occurrence and some others, were first mentioned, should be removed, it cannot say, that the manner in which they have been accounted for, has had that effect.

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The secrecy with which these holes were made; the place chosen for the purpose; the instrument made use of; the manner in which they were closed; the mode of fastening the plugs, with the anxiety discovered to prevent a discovery previous to the first trial; and the chance by which the disclosure was at last made, render it very difficult to believe, that their design was such as is now pretended, or any other than to produce a leak, which was to furnish the means of defence against a prosecution, which, it was foreseen, would take place, on the return of the vessel to the *United States*. I take no notice of the erasures in the log-book, because it is possible they may have been made *bonâ fide*; and it



September, 1808. appears from the witnesses, that from the winds which prevailed, the vessel might very well have been where

U. STATES she was, when it was determined to bear away. But taking all the testimony and circumstances together, I am compelled, with every inclination to come to a different result, to believe. that the claimant has altogether failed in showing such a necessity as would, under an express exception in the statute, have justified him in going to a foreign port. The judgment of the court, therefore, is, that the decree of the district court condemning the Brig *James Wells*, be affirmed.

# CASES

ARGUED AND DETERMINED

IN THE

## CIRCUIT COURT

OF

### THE UNITED STATES,

HOLDEN AT NEW-HAVEN, WITHIN AND FOR THE  
DISTRICT OF CONNECTICUT, APRIL, 1809.

PRESENT, HON. { BROCKHOLST LIVINGSTON,  
Associate Justice of the *Supreme*  
Court of the *United States*.

HON. { PIERPONT EDWARDS,  
District Judge for the District of  
*Connecticut*.

CHRISTOPHER GIBBS CHAMPLIN, as Executor of CHRIS- April, 1809.  
TOPHER CHAMPLIN, *against* JAMES TILLEY and WIL-  
LIAM TILLEY.

THE plaintiff, in his declaration, stated, "that at *New-Port*, the defendants, by said *William Tilley*, purchased of said deceased a quantity of hemp, to be manufactured at their rope factory in *New-London*, on a credit of four

Letters testa-  
mentary is-  
sued under  
the authority  
of one state  
are not availa-  
ble in another.

But if to an action brought by an executor, on a cause of action arising in the life-time of the testator, the defendant plead the general issue, the plaintiff cannot be required, on the trial, to produce any letters testamentary.

April, 1809. months, and to secure payment thereof, the defendants,  
 CHAMPLIN at said *New-Port*, by said *William Tilley*, one of said  
 v firm and company, and then joint mechanic and trader  
 TILLEY. with said *James Tilley* as aforesaid, made, executed, and  
 to said deceased, then in full life, delivered a certain  
 writing or promissory note, in the words and figures  
 following, *viz.*

"We, *William Tilley* and company, of *New-London*, promise to pay *Christopher Champlin*, of *New-Port*, or his order, within four months from the date hereof, five hundred and eighty dollars, value received. Witness our hands, *New-Port*, *January*, 31st, 1804.

"*William Tilley & Co.*

"Witness,

"*George G. Whitehorne.*"

When the cause came on for trial, *William Tilley*, who had failed and absconded, was defaulted; *James Tilley*, the father of *William*, and a man of property, appeared and pleaded *non assumpsit*.

*Daggett*, for the defendants, called upon the plaintiff's counsel for evidence, that the plaintiff was executor to the deceased. He said, that unless this were shown, there was no propriety in proceeding any farther in the cause. He stated, at the same time, that no letters testamentary, issued by any authority out of the state of *Connecticut*, could be admitted as evidence before the courts of this state, according to a decision of the *Supreme Court of Errors*, at their last session in *Hartford*.(a)

*Goddard*, for the plaintiff, replied, that he was somewhat surprised by the motion, though he apprehended

(a) Vide *Riley v. Riley*, ante, 74.



that the defendant was too late with it, and that advantage ought to have been taken by plea in abatement, as the want of lawful appointment to be executor is a disqualification to sue in this case.

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LIVINGSTON, J. having inquired, whether there was a profert of letters testamentary, was answered in the negative, and that it was not common in our practice to make such a profert, the mere naming the plaintiff as executor being considered as sufficient to enable the defendant to plead *ne unques executor*.

His honour then observed, that it must undoubtedly be good law, that letters testamentary should be used only within the jurisdiction under which they were issued, and that he should have no doubt, in a proper stage of the proceeding, as to requiring the production of such letters issued under the authority of the state of *Connecticut*: and he did not see but the plaintiff in this case must produce his claim to the character of executor, if the defendant required it.

At the request of the plaintiff's counsel, the question was permitted to rest till afternoon, as he wished to look at authorities, that he might be able to show that the defendant was too late in his motion.

This was assented to by the court.

At the opening of the court in the afternoon,

Goddard proceeded to show, that on a plea of *non assumpsit*, when the case is entered upon before the jury, it is too late to call for letters testamentary. He cited, as in point, *Prake's Ev.* 342. last edition, and *Marsfield v. Marsh*, 2 *Ld. Raym.* 824.

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*Daggett*, in reply, stated, that in *Edwards v. Stapleton*, *Cro. Eliz.* 551. *Browning v. Fuller*, *Cro. Jac.* 299. and *Cutts v. Bennett*, *Cro. Jac.* 400. it was decided, that a profert of letters testamentary is matter of substance. The reason of these decisions must be, because the plaintiff may be called upon to prove them to be legal and genuine.

The court said, that they were satisfied by the authorities read by Mr. *Goddard*, that the plaintiff could not be called upon, in this stage of the proceeding, to prove his claim to the character of executor.

LIVINGSTON, J. said, that he was of a different opinion in the morning, but was convinced by the authorities. As to the cases read by Mr. *Daggett* from *Cro. Eliz.* and *Cro. Jac.* it might well be matter of substance, that profert of letters testamentary should be made; that the plea of *ne unques executor* may be tendered, while, nevertheless, the plaintiff could not be compelled to prove himself executor on trial to the jury.

In an action against *A.* and *B.* as partners, on a contract executed in the partnership name, *A.* suffered a default, and *B.* pleaded the general issue: Held, that letters written by *A.* in the partnership name, could not be read in evidence by *B.* to show, that he was not a partner with *A.*

In the course of the trial to the jury, the counsel for the defendant read several letters from the testator, *Christopher Champlin*, to the defendant, from which it appeared, that the testator did not consider the defendant, *James Tilley*, as a member of the firm of *William Tilley & Co.* In one of these letters, six other letters, purporting to be written by *William Tilley & Co.*, and promising payment, were enclosed; and with them, the note on which this action was brought. The counsel for the defendant were proceeding to read these enclosed letters; but an objection being made,

THE COURT said, that the letters, whether written by *William Tilley* or not, were entirely irrelevant; though

the letters of the testator were good evidence to prove April, 1809.  
that he did not suppose *James Tilley* to be a partner.

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An account book was produced by the plaintiffs to prove, that *James Tilley* was connected with his son *William* in business. In this book two entries were found in the hand-writing of *James Tilley*, many in the hand of *William Tilley*, and some in the hand of other persons.

In such case, an account book, containing entries made by *A.* and *B.* may go to the jury as evidence of a partnership.

The counsel for the defendant objected to reading to the jury any charges made in the hand of *William Tilley*.

BY THE COURT. The book must go to the jury, as it has been proved, and indeed conceded, that *James Tilley* made a few entries in it. The jury are to decide whether the book, as it is, amounts to any proof of partnership.

The jury found a verdict for the defendant.

His counsel then moved, that judgment should be entered up for both defendants, though one of them had been defaulted.

THE COURT said, this was the correct mode of proceeding; for if the jury had found, that one defendant assumed and promised, and the other did not, judgment must have been entered up for both, the declaration being founded on a joint promise only.

In an action on a joint contract against two, where one has suffered a default, and the other has obtained a verdict, judgment must be entered up for both.



April, 1805.

### ANONYMOUS.

After an affidavit in support of a motion for the continuance of a cause, on the ground of the absence of a material witness, has been made, the opposite party may make a counter affidavit, stating any circumstances that render it impossible, or improbable, that the evidence of the witness can be obtained within a reasonable time; but such counter affidavit must not deny the materiality of the evidence.

ON motion for the continuance of this cause, the party made an affidavit stating the absence of *Josefik Howland, jun.* a material witness, and that he hoped to procure the testimony of the witness at the next court.

A counter affidavit was filed, stating that *Joseph Howland, jun.* was gone to foreign parts; that he expected to have no fixed residence; and that he did not expect to return within two or three years.

THE COURT would not continue the cause; and took the opportunity to observe, that there was manifest utility in counter affidavits, as was evident from the present instance. They said, however, that counter affidavits should not deny the materiality of the evidence expected from the witness, but might state any circumstances, that rendered it impossible, or improbable, that his testimony could be procured within a reasonable time.

EDWARDS, J. said, that the *English* practice was lame in this respect; that it threw great power into the hands of a party; and that this court was perfectly free to establish a better practice. He added, that the whole *English* practice of admitting affidavits was modern.

April, 1899.

STEPHEN HOWARD *against* JEDUTHAN COBB.

THIS was an action on a joint note, signed by *Ashbel Stanley* and *Jeduthan Cobb*, but was brought against *Cobb* only, it being alleged, that *Stanley*, since the execution, had become a bankrupt under the laws of the *United States*.

In an action on a promissory note executed by *A* and *B* jointly, brought against *B* only, after the bankruptcy of *A* under the laws of the *United States*, it was held that the admissions of *A* were evidence against *B*.

The defendant pleaded a discharge in full to *Stanley*.

On this plea issue was joined, it being contended by the plaintiff, that the discharge was forged.

*Daggett*, for the plaintiff, offered the declarations of *Stanley* in evidence, to prove, that he had acknowledged the debt to be due, long after the discharge purported to have been executed.

*Goddard*, for the defendant, objected to the admission of this evidence, on the ground that as *Stanley* was absolved from the payment of this note by his certificate, he could be examined as a witness; and therefore, his declarations could not be proved.

BY THE COURT. If *Cobb* should be compelled to pay this note, he could compel *Stanley* to indemnify him,<sup>(a)</sup> as it would be a debt accruing after the bankruptcy of *Stanley*. His declarations, therefore, may be proved.

The plaintiff obtained a verdict.

(a) It had been stated by the counsel on one side, and assented to, on the other, that *Cobb* signed the note only as surety for *Stanley*.

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HOWARD

v.

COBB.

If the jury separate after a case is committed to them, and before they have agreed in a verdict, and afterwards return a verdict, it will be set aside.

The defendant moved in arrest of judgment. The principal ground was, that the jury had separated, and mingled with the inhabitants of *New-Haven*, before they had agreed upon a verdict.

The fact was not conceded, though the counsel for the plaintiff stated, that this had been the general practice in *Connecticut*; that juries had always separated, when they pleased.

But neither the jurors, nor the officer to whose care they were committed, can be compelled to testify to the fact of such separation.

*Goddard*, for the defendant, called upon one of the jury as a witness to establish the fact of such separation.

THE COURT informed the juror, that he should not be compelled to answer, as it was a misdemeanor in him; but that he might answer, if he pleased.

The juror declined answering.

The deputy-marshal, to whose care the jury had been committed, was then called.

THE COURT said, that he could not be compelled to answer, unless he pleased.

He declined.

The counsel for the defendant then proposed to wait until the rest of the jury should come in, observing that perhaps some of them would be willing to testify.

THE COURT said they would not wait a moment in such a case as this.



The counsel for the defendant then offered to prove the declarations of the jury, as evidence of the fact in controversy.

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v.  
GREEN-  
LEAF.

THE COURT said, they would not hear such declarations. They expressed, however, a clear opinion, that judgment must have been arrested, if it had been proved, that the jury separated before they had agreed upon a verdict. The statute of this state<sup>(a)</sup> they considered so explicit and imperative, that it could not be evaded, let the practice be ever so universal against it.

In the next case, the court appointed an officer to take care of the jury, and charged him not to suffer them to separate, until they had agreed in a verdict, nor to speak to them, except to ask them if they were agreed.

(a) Th. 6. c. 1. s. 11.

ROBERT STUART and HAMILTON STUART *against*  
DAVID GREENLEAF.

THIS was an action by the endorsees of a promissory note against the maker.

The note was made in the state of *New-York*, and was, by the laws of that state, negotiable. It was payable to *John I. Staples & Son*, and by them endorsed to the plaintiffs.

The defendant offered in evidence two receipts, signed by *John I. Staples & Son*, for two hundred dollars each, which he contended ought to be allowed in part

Whether, in an action by the endorsee of a negotiable note against the maker, a discharge by the payee shall be available as a defence, until it be shown by the maker, that the receipt was given before the endorsement was made?

April, 1809. on the note, unless the plaintiffs could prove, that it was assigned to them, before the receipts were given.

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v.  
BARKER.

The plaintiffs contended, that the *onus probandi* lay upon the defendant; that every endorsed note was presumed to have been endorsed the day it was made, or at any rate, before it became due, unless the contrary were shown.

And of this opinion was LIVINGSTON, J.

EDWARDS, J was of a contrary opinion; and strenuously contended, that the *onus probandi* lay upon the plaintiffs.

It afterwards appeared, that the case was with the plaintiffs on other grounds.

*Daggett* and *Bristol*, for the plaintiffs.

The *District Attorney*, for the defendant.

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NATHAN SMITH against JACOB BARKER.

Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, it was held, that the variance was fatal.

THE declaration was as follows: "That before the 8th day of *February*, 1806, the plaintiff had entered into a certain contract with the defendant, to build him a ship, which, on said 8th day of *February*, was building, the same not being finished; and the defendant, on said 8th day of *February*, in consideration of the plaintiff's building said ship, and the sums which would become due to the plaintiff for building said ship pursuant to said contract,

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and in part payment thereof, made, executed and delivered to the plaintiff his certain writing, or note, in the following words, to wit, "Dollars 500. Whereas *Nathan Smith* is building a ship for me on the contract, for which I shall have to pay him a considerable amount, when said contract is completed, I hereby agree to pay said *Nathan Smith*, or order, five hundred dollars, as soon as that amount shall become due *per* said contract. *Jacob Barker*;" as *per* said note, which, without date, was, in fact, executed and delivered at *New-York*, on said 8th day of *February*, now ready in court to be 'shown will fully appear. And the plaintiff says, that he did afterwards complete and finish said ship, according to contract, and said sum of five hundred dollars became due to the plaintiff in the month of *May*, 1806, when said ship was completed and finished, and to the defendant delivered, and by him received; which sum of five hundred dollars the defendant hath never paid, nor any part thereof, according to the tenor of said writing, but the same is now justly due. Whereupon the plaintiff says, that by reason of the premises, and by force of said writing, the defendant, on or about the 1st day of *May*, 1806, after said ship was completed and delivered to the defendant, became justly indebted and liable to pay him said sum of five hundred dollars, and being so liable and indebted, the defendant did afterwards, on said 1st day of *May*, in consideration thereof, assume upon himself, and to the plaintiff faithfully promise," &c.

The plea was *non assumpsit*.

The plaintiff, to make out his case, read in evidence the following contract: "*New-London*, 26th of *October*, 1805. I agree to finish the ship I am now building at *Stonington* in about one month in a workmanlike manner, with patent windlass, flush decks, &c. [particularly specifying the manner in which the decks, hull, masts,



April, 1809. &c. were to be made,] when I agree to sell her to  
 SMITH Jacob Barker at thirty dollars per ton, carpenter's ton-  
 v. nage, payable one thousand dollars cash in all next  
 BARKER. month, pay my draft at sixty days for five hundred dol-  
 lars, one hundred dollars of prime flour in *New-York* at  
 the market price, two thousand five hundred dollars in six  
 months after the ship is completed, and the other half  
 in merchandise, at the market price, such articles as I  
 may want. If, however, the ship don't suit Captain  
*G. Barney*, the said *Barker* is to take only one half of  
 her at the above rates, and these payments to be in pro-  
 portion.

"*Nathan Smith*!

"*Jacob Barker*."

*Goddard* and *Cleaveland*, for the defendant, insisted,  
 that the contract proved was not the same with that de-  
 scribed in the declaration.

First, the consideration is not the same. The declaration  
 states the contract to be *for the building of a ship*. The  
 consideration of the contract proved is the *finishing* and  
*selling* of a ship to *Barker*.

Secondly, the declaration states, that the money was  
 due on *the 1st of May*. The proof is, that it was not due  
 until *November*, six months afterwards.

Thirdly, the contract proved says, that the ship, when  
 finished, was to be sold to *Barker*. But on this point the  
 declaration alleges nothing.

*Daggett*, in reply, observed,

First, that the consideration stated in the declaration,  
 to wit, *the building of the ship*, was taken from the words

of the note on which, &c. As the note recites the consideration, we are correct in taking the description of the contract, which the note has given.

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Secondly, that the money is proved, as we contend, to have been due, as stated, *on the 1st of May*. This is a question of fact, which the jury must determine.

Thirdly, that if the declaration is defective for want of more allegations, advantage may be taken of such deficiency by motion in arrest, but it is no variance.

LIVINGSTON, J. It is the opinion of the court, that the consideration alleged is so different from the one proved, that we cannot let it go to the jury. The consideration alleged is the building of a ship. The consideration proved is the finishing of the ship *Eliza* already built in part, and the selling it to the defendant. Every one knows that to build a ship for another is an essentially different thing from finishing one partly built, or selling one finished. This ship was *Smith's*, while she was building, till she was finished, and till she was sold and delivered. Without deciding any other points which have been made, <sup>(a)</sup> we are of opinion that none of the proof offered with respect to the contract in this case can go to the jury.

The plaintiff then moved to amend.

This was objected to, on the part of the defendant, on the ground that it was too late.

THE COURT said, that the plaintiff could amend in any stage of the trial, if the case had not been actually committed to the jury.

A declaration may be amended in any stage of the trial, before the case is actually committed to the jury.

(a) Several other points of law were made by counsel, in the course of the trial; but as no decision was had upon them it was not thought best to state them particularly in this report of the case. R.

April, 1806.

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BARKER.

On the 26th of October, 1805, *A.* agreed to finish a ship then partly built, in about one month, and then sell her to *B.* at a certain price per ton, payable in a manner, and at times, specified. On the 8th of February, 1806, *B.* gave his note for the payment of a certain sum as soon as that amount should become due on the contract. Held, that this note became payable only upon a strict fulfilment of the contract on the part of *A.*; that a finishing and delivery of the ship on the 30th of April, 1806, was not such a fulfilment; and that a release from *B.* of all exceptions arising from a non-fulfilment would not give *A.* a right of action on the note.

The declaration was accordingly amended, by inserting and declaring upon the contract above recited. Then there was inserted a letter from the defendant to the plaintiff, dated *November 21st, 1805*, in which the defendant concludes to take the whole ship, and introduces a Captain *Waterman* as his agent, to superintend the finishing of the ship. Then it was averred, that *Waterman* did superintend the finishing and rigging of the ship; and that the defendant, on the 8th day of *February, 1806*, in pursuance of the contract, executed the note on which, &c. The plaintiff then introduced an averment, that he finished the ship, in all respects, as specified; sold her to the defendant, on the 30th of *April, 1806*; and delivered her with a bill of sale to *Waterman*, as the agent of the defendant; that *Waterman* received the ship, and made an endorsement upon the contract in the following words: "Received the ship of Captain *Nathan Smith*, agreeable to the within contract; and I, as attorney to *Jacob Barker*, do discharge said *Smith* from all demands, that said *Barker* has by law or equity, for not delivering her before; as witness my hand, this 30th day of *April, 1806*."

"*D. Waterman*, attorney for *J. Barker*."

The plaintiff then averred, that by said writing of the 8th of *February, 1806*, the defendant assumed, and promised to pay to the plaintiff, or his order, five hundred dollars, as soon as that amount should become due by said contract; and that on the 30th of *April, 1806*, said sum was due from the defendant to the plaintiff, by said contract, and by the completion, delivery and sale of said ship.



After the declaration had been thus amended, it was agreed by the counsel, to submit the case to the same jury, who had heard the evidence adduced in the former stage of the trial.

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LIVINGSTON, J. in his charge to the jury, said, that the contract now stated in the declaration was, that *Smith* should finish the ship *Eliza* in a workmanlike manner, and sell her to *Barker* in about one month. The defendant had objected, that this contract was not complied with, because the ship was not built in a workmanlike manner. Little proof had been adduced by the defendant to this point; and he considered it as not much insisted on by his counsel. As to the *time*, it was proved, that the ship was not delivered till after six months had elapsed. Nobody could consider this as the fulfilment of a contract to deliver in about one month. But it was insisted, for the plaintiff, that whatever breach of contract there has been, on his part, all advantage to be derived from it had been waived expressly by the defendant. But this note was to become payable, when the sum of five hundred dollars should become due on the contract. If the contract was not complied with, this note could not have become due. The court were decidedly of opinion, that if *Barker* had expressly waived all exceptions arising from want of fulfilment of the contract, by writing under hand and seal, yet this note would never have become due.

The plaintiff thereupon suffered a nonsuit.

# CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF ERRORS,

HOLDEN AT NEW-HAVEN, IN JUNE, 1809.

PRESENT, THE HON. STEPHEN MIX MITCHELL,  
Chief Judge.

TAPPING REEVE,  
ZEPHANIAH SWIFT,  
JOHN TRUMBULL,  
WILLIAM EDMOND,  
NATHANIEL SMITH,  
JEREMIAH G. BRAINERD,  
SIMEON BALDWIN,  
ROGER GRISWOLD,

JUDGES.

June, 1809.

JOHN B. JUDSON and HEBZIBAH, his wife, *against*  
WALKER LAKE.

The decree of a court of probate establishing a will containing a devise of real estate, is conclusive upon the heirs of the devisor, until disaffirmed on appeal, or set aside in due course of law.

THIS was an action of ejectment for one undivided seventh part of a piece of land, which the plaintiffs claimed, in the right of the wife, as one of the heirs at law of *Ann Lake*, deceased.

The defendant pleaded the general issue.

On the trial, it was proved and admitted by the parties, that on the 1st of *January*, 1797, *Ann Lake* died seised of the premises; that she had previously made her will, while the wife of *Jabez Lake*, whereby she devised the premises to the defendant; and that on the 9th of *June*, 1797, said will was proved, and offered to the court of

probate for approbation, whereupon the following decree was passed: "*At a Court of Probate held at Stratford, June 9th, 1797.* The within will being proved, and offered to this court for approbation, the same is by this court approved, and ordered to be recorded, the executor having accepted the trust committed to him, and given bond as the law directs." From this decree no appeal was taken; and the time limited for taking such appeal had elapsed before the commencement of this action, so that none could now be taken. The only question in the case was, whether the devise of *Ann Lake*, executed by her while under coverture, and duly proved, and approved by the court of probate, was sufficient in the law to defeat a title by descent in the heirs? The superior court instructed the jury, that the decree of probate, not having been appealed from, but remaining in full force, was *conclusive* upon the heirs at law of the devisor, as to all the real estate thereby devised, of which she died seised, and that the title of *Hebzibah Judson*, one of those heirs, was thereby defeated. They, therefore, directed the jury to find for the defendant; which was accordingly done.

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LAKE.

The plaintiff moved for a new trial; and the court reserved the motion for the consideration of the nine judges.

*Gould* and *R. M. Sherman*, in support of the motion, contended,

1. That the devise of *Ann Lake*, being executed by her while she was a *feme covert*, was void. The case of *Fitch v. Brainerd*, 2 Day, 163. was relied upon as decisive of this point.

2. That the decree of probate establishing the will, vested no title in the devisee. By the common law of *England*, real estate, on the death of the owner,



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vests *immediately* in the heir or devisee. The personal estate only goes to the executor or administrator. The law having settled the course of the former, has made no provision for its management. The latter is alone the subject of cognisance by the ordinary. He must look so far into a devise of real estate as to ascertain who is the executor, where *personal* estate of the deceased is left. But the devise, *quoad* the real estate, derives no validity from probate. As on *not guilty* in trespass, the title of real estate is tried, as inducement only, and not as the gist of the issue; so here, the validity of the will is tried, to ascertain the executor, and for some other purposes, but not to affect the title of the heir. With that title the ordinary has no concern. *For. on Mort.* 688.

The statutes of *Connecticut* have vested the powers and duties of the ordinary in the court of probate; and have given that court no additional power as to real estate. Here, as in *England*, the real estate vests in the *heir*. He alone can bring trespass, or ejectment. The executor can only bring trover, &c. for injuries to the personal fund. The court of probate has no power as to the former, except to order a sale for the payment of debts, when the personal fund is deficient, and to cause distribution to be made. To effect the objects of its jurisdiction, the court of probate must decide on the competency of the testator, and the formality of the execution of the will; otherwise, it cannot make distribution, or ascertain the executor. But its determination is *conclusive* as to those objects only. The *title* to real estate, with which that court has no concern, is left unsettled by its decree.

The power given the court of probate to order sale, and make distribution of real estate, involves no authority to decide on the *title* of such estate. The statute establishing that court concludes thus: "And of acting in all testamentary and probate matters, and in every other

thing proper for the court of probate to act in, *according to law.*" Tit. 42. c. 1. s. 61. General, unspecified powers are here given, which are to be ascertained by reference to *the common law.*

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*Ingersoll and Hatch, contra.*

To lay a foundation for a new trial in this case, it must be established, in the first place, that the land in question did not pass by the devise; and, in the second, that a sentence, or decree, of a court of probate, establishing a will, is not conclusive as to real estate.

1. As to the first point: The will, or devise, is claimed to be void, only on account of the supposed incapacity of the devisor; she having been, at the time of making it, a *feme covert*. This brings up, for the determination of this court, the much litigated question, whether a married woman, by our law, previous to the act of the last session, could devise her real estate? This question was barely stated by the counsel; it could answer, they said, no purpose to go into the argument at length, The subject had been repeatedly, and very fully, discussed. The decision in the case of *Fitch v. Brainerd*, 2 *Day*, 163. they denied to be law. The most that could be said of that case was, that it was directly opposed to a former decision of the same court of many years' standing, (*Adams v. Kellogg, Kirby*, 195.) and to a long series of decisions in the inferior courts. It was therefore claimed, that should it be necessary, in the determination of this case, the court would go into the merits of the question, considering, that the decisions in the old court of errors did not settle it either way.

2. The only remaining question is, whether, by our law, the jurisdiction of courts of probate extends to the real estate of deceased persons? For it is agreed, in

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this case, that, if the court of probate had jurisdiction of the subject matter, its sentence, or decree, not appealed from, is conclusive; and therefore, that the validity of the devise cannot be collaterally drawn in question.

The rules of the *English* law are admitted to be, as laid down by the counsel in support of the motion. The ordinary, in *Great Britain*, has not jurisdiction of real estate; the heir there is not a party to a sentence, or decree proving and approving a will. But still the question recurs, what is the law of *Connecticut*? For, on this subject, it is conceived, we have a system entirely distinct and different from the *English* system. Our own legislature has limited and defined the jurisdiction of our courts of probate, by positive statute; and it is from an examination of the powers thus given, and not from any analogy presented by an *English* prerogative court, that a correct judgment is to be formed on the point now under consideration.

By the 61st section of the "Act for constituting and regulating courts," &c. it is provided, that "courts of probate shall have the power and cognisance of the probate of wills, and testaments, granting administration, appointing and allowing of guardians, and of acting in all testamentary and probate matters, and in every other thing proper for a court of probate to act in, according to law." It is readily admitted, that this provision was not intended to enlarge the jurisdiction of probate; nor was it intended, by any reference to the *English* law, to operate as a restricting clause. It was undoubtedly introduced, for the purpose of identifying a court having a certain jurisdiction, and not for the purpose of limiting or defining that jurisdiction. We must, therefore, recur to the specific powers given by other statutes, in order to determine the question we are now considering. If it be shown generally, that a court of probate has the same control



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over real, as over personal estate, and especially, if it be shown, that a power is given, in the exercise of which in almost every case, the validity of a devise of lands must be necessarily adjudicated upon; it is believed no doubt can remain as to the decision of the case at bar.

The first act to be done, in case of a testate estate, is to prove the will. It is made the duty of an executor to present the will, within thirty days after the decease of the testator, and cause it to be proved, and recorded, or to present it and decline executorship. *Stat. Conn.* tit. 60. c. 1. s. 2. The statute makes no distinction between a will of *real* and one of *personal* estate. Suppose, then, a mere devise of real estate, with the appointment of an executor, would it not be his duty to present the will? Would he not incur the forfeitures of the statute by neglect? Upon the principles contended for on the other side, he clearly would not.

Another part of the office and duty of an executor, in such case, is the making and presenting of an inventory. This is to be made "of all the estate of the person deceased as well moveable as not moveable, whatever." The executor is bound to exhibit it within two months after probate of will, and this under a penalty for neglect, unless he render a sufficient excuse, to the acceptance of the judge. *Stat. Conn.* tit. 60. c. 1. s. 4, 5.

Further, the real estate is a fund for the payment of debts, and may be sold for that purpose, under an order of the judge of probate, in all cases, where the personal fund is insufficient. Indeed, whenever the debts of the deceased "cannot be fully paid out of the personal estate, without prejudice to the widow or heirs, by depriving them of necessary stock," &c. the judge may, at his discretion, order a sale of land, for the payment

June, 1809. of such part "as he shall judge reasonable." *Stat.*  
 JUDSON *Conn.* tit. 60. c. 1. s. 22. and c. 3. s. 1.  
 v  
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But lastly, courts of probate are empowered by statute, to order a distribution of the real, as well as of the personal estate, and in precisely the same terms. Their power over the one subject is the same as over the other; and this, whether the estate be testate or intestate. In the one case, the distribution is to be according to the will, or devise; in the other, according to law. *Stat. Conn.* tit. 60. c. 1. s. 12. and c. 8. But how, let it be asked, is it possible for the court to determine the question, to whom distribution is to be made, whether to the heir or devisee, without adjudicating upon the validity of the devise? This question will necessarily arise in every case, where the real estate is, by will, given to different persons, or in different proportions, from those prescribed by law; and these are the only possible cases in which the same question could be brought up in actions of ejectment.

Thus, we see, that the sentences, or decrees of a judge of probate as much respect real, as personal estate. The will is to be proved and approved in the same manner; the inventory must embrace both; distribution is in like manner to be made, whether this estate be testate or intestate; and each kind of estate is eventually a fund for the payment of debts, and may be sold for that purpose under an order of the judge. The only difference is, that, as a general rule, the personal fund must be exhausted before resort can be had to the real estate for the satisfaction of debts.

But we are told, that, in the exercise of all these powers, a court of probate does nothing more than the ordinary may do in *England*; and that a distribution under an order or decree of that court does not conclude the

question of title, as between the heir and devisee. Why, and how far, then, is a similar sentence or decree conclusive in the case of personal property? Our statute makes no distinction as to the effect and operation of such decree in the two cases. *Stat. Conn. ut sup.* It would surely be thought a strange proposition to lay down, that one who claims the personal property of a deceased testator, under the statute of distributions, should be permitted to try the validity of the will, after probate, in an action of trover against the legatee. It would be thought equally absurd, that the heir, after probate, should be permitted to try the same question in an action of ejectment; if our notions on the subject had not been confused, by blending, in our view of it, the rules of the *English* system with our own.

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But, if the construction now contended for had been less obviously just, in the beginning; if there had been even some doubt respecting the operation of decrees of probate upon devises of real estate; still that construction is established by long, and uninterrupted usage, under our system. When a will is presented to probate, to be proved, &c. is it not established in our practice, that the heir may appear, and contest its validity? Upon the principles contended for on the other side, this is a usage without law; for he is no party to the proceedings in probate; and, indeed, those proceedings, so far as they respect his rights, are *coram non judice*.

Further, if the decree of probate, in such case, establish the will, has not the heir a right to appeal; and then further, as the case may be, to bring a writ of error? If the proceedings in probate, as far as they respect the rights of the heir are void, as being *coram non judice*, and if he is no party to them, he plainly has not; for the statute allows an appeal, only in favour of those, who are "aggrieved with the judgment, sentence,"



June, 1809. &c. of a court of probate. *Stat. Conn.* tit. 42. c. 1. s. 95.

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Yet no point is better settled, than that all this may be done; our practice has been uniform from the beginning. The heir appears as a party before the court of probate; he takes his appeal to the superior court, and then brings his writ of error to this court. After all, shall he be permitted to turn around, bring his action of ejectment, and go over the entire ground again? Has not the subject matter been adjudicated upon? If not, our highest courts have been employed, strangely enough, in trying cases, which they had no power to determine.

The decision in the case of *Bush v. Sheldon*, 1 Day, 170. would seem to settle the point, that the heir may be a party to a decree of probate, and that, in a class of cases to which the jurisdiction of that court does not more clearly extend, than to those like the present, such decree is conclusive.

BY THE COURT. The only question necessary to be decided in this case is, whether the probate of the will of Mrs. Lake is not conclusive regarding the validity of the will, until it is reversed on appeal to the superior court? And we are of opinion, that the law is so, that the will must stand until such reversal takes place. The statute of this state gives to the courts of probate cognisance of the probate of wills, and allows to all parties aggrieved an appeal to the superior court. Every matter of law and fact regarding the validity of wills, both as they respect real and personal estate, is confided to the courts of probate; and the decisions of those courts, while they stand unreversed, are as *conclusive* as the decisions of any other courts of record on matters within their jurisdiction.

New trial not to be granted.

June, 1809.

JONATHAN TOWNSEND *against* SHIPMAN WELLS.

## WRIT of error.

The declaration was as follows: "That the defendant, in and by a certain writing or note, under his hand, by him well executed, dated the 30th day of June, 1806, promised the plaintiff to pay to him, for value received, the sum of eighty dollars, to be paid in good West-India rum, sugar, or molasses, at the election of the plaintiff, to be paid in eight days next after the date of said note, as by said writing or note, ready in court to be shown, appears. Now, the plaintiff further says, that the defendant, his promise aforesaid not regarding, hath never performed the same, though often requested and demanded; which is to the damage of the plaintiff," &c.

To this declaration the defendant demurred; and the superior court adjudged the same insufficient.

*Bradley*, for the plaintiff in error.

The exception to the declaration is, that it has no allegation that the plaintiff made, and notified the defendant of, an election of what articles mentioned in the note the plaintiff would receive in payment.

It will be agreed, that if the defendant had, on the day, tendered to the plaintiff one of the articles mentioned in the note, the plaintiff, to avoid the effect of the tender, must aver, that he had elected to receive payment in the other articles, and that he had given the defendant reasonable notice of his election; and must state the time and place of such notice, that the court

In an action on a promissory note for 80 dollars, to be paid in good West-India rum, sugar, or molasses, at the election of the payee, within eight days after date, it was held to be unnecessary to aver, that the payee made his election, and gave notice thereof to the promisor, as the latter was bound, at all events, to make payment in one of the articles specified within eight days, and on failure, became immediately liable.

June, 1809. may judge of its reasonableness; and that the defendant may, if he choose, plead the tender, and then traverse this notice.

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If the plaintiff would claim the benefit of an election, he must make it; and if he makes it, as it is a matter confined to his own knowledge, he must notify the defendant of it. But he might waive the benefit, if he chose; and then the right of election would devolve upon the defendant.

There are cases, in which, in an action upon a contract, it is necessary that performance of something be averred by the plaintiff, in order to perfect his right of action. The first case is, where the promise is made upon express condition of something to be previously done by the plaintiff.

In the present case, there is no such condition; but the contract is absolute, that the defendant will pay *in rum, sugar, or molasses, at the election of the plaintiff*.

A second case of the kind specified is, where the consideration of the defendant's promise is executory; as if the contract be to build a house. Here, the plaintiff must aver performance.

But in this case, the consideration is executed, and the plaintiff acknowledges in this note, that he has received the value of his promise.

The cases in which the defendant is entitled to notice from the plaintiff, are those where the performance of the act, on which the plaintiff's right of action arises, is secret and unknown to the defendant; and also where the defendant cannot know what he has to do, except by information from the plaintiff; as would be the case of an



agreement to account before auditors such as the plaintiff should assign, or to execute such a deed as the plaintiff should devise, or pay the plaintiff's costs of such a suit. *Com Dig. tit. Pleader, (C. 73.)*

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In the present case, the defendant promises, for value received, to pay the plaintiff eighty dollars worth of rum, sugar, or molasses, at the choice of the plaintiff. Here, the undertaking is intelligible and certain; and although a power is vested in the plaintiff to vary the duty of the defendant, yet he has not varied it, but left the election in the defendant.

Suppose the plaintiff, on the day on which these articles were to be delivered, had gone to the defendant, and told him, "I have no choice to make; pay me as you please;" would not the defendant have been thereby put to his election with respect to the manner of satisfying this contract? But it can make no difference whether the plaintiff expressly refused to make an election, or merely neglected to make it. In both cases, the plaintiff waives the right of choosing; and, from the nature of the case, the defendant must know it.

This contract is expressed to be for value received, and is wholly for the benefit of the plaintiff. Now, he for whose benefit a contract is made, may waive any advantage of it, if he chooses so to do; and if he can waive the whole, he may a part; but a waiver of a part does not discharge the obligation to perform the residue. In this case, the plaintiff waives his right of election with respect to these articles; but that is no waiver of his right to receive some of these articles in payment of his debt, and such as the defendant may choose to deliver.

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If *A.* should engage to build and paint a house for *B.*, and the latter should afterwards declare to him, that he would not have the house painted; this might excuse *A.* for not painting the house, but would be no reason why he should not build it.

Suppose an election had been given to the plaintiff with respect to the place of payment; if the plaintiff had given reasonable notice to the defendant, he must tender at the place appointed; but if the plaintiff made no election it would follow, not that the defendant was not bound to pay at all, but that he might tender at either place mentioned, according to his own election.

*Peters*, for the defendant, contended, that the omission of an averment in the declaration, that the plaintiff made his election, and gave reasonable notice thereof to the defendant, was fatal. In support of this general exception, he relied upon the following propositions:

1. That in an action on contract for collateral articles, payable on demand, the plaintiff must allege a demand, specifying the time and place, or his declaration will be ill. *Dean v. Woodbridge*, 1 *Root*, 191. *Smith v. Leavensworth*, 1 *Root*, 209. 3 *Bac. Abr.* 713. *Dub. edit. Fitzhugh v. Dennington*, 6 *Mod.* 227.

2. That whenever an obligee has an election, with which the obligor is bound to comply, the election is part of the contract, and must be made in due time, and alleged in the declaration. 1 *Bac. Abr.* 432. *Dub. edit. Grenningham v. Ewer, Cro. Eliz.* 396. 539. *Bulley v. Hubbins, Cro. Car.* 571. *Holmes v. Twist, Hob.* 51. *Lamb's case*, 5 *Co.* 24. *Basket v. Basket*, 2 *Mod.* 200.

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Such a construction must be given to the note as will preserve the rights of the parties unimpaired, and, at the same time, leave the promissor bound for the payment, until the note is satisfied. The note binds the promissor to pay the promisee eighty dollars in rum, sugar, or molasses, within eight days of the date. The promissor has the right, therefore, of making payment in one or the other of these articles. The promisee has, also, by the condition of the note, a right to elect, within the eight days, which of the articles he will receive in payment. But this right of election must not be exercised in such a manner as to defeat the right of the promissor to perform his contract, by delivering the article selected within eight days. Hence, it follows, that the promisee must elect, if he intends so to do, in such season as will allow the promissor time to deliver the article within the eight days; and if he delays beyond that time, the promissor may, and is bound to perform his contract, by delivering one of the articles stipulated for. And the defendant, having failed to perform his contract within the eight days, became immediately liable on the note.

Judgment reversed.



June, 1809.

JOSEPH HAMILTON and REBECCA, his wife, *against*  
JOSHUA HEMPSTED.

*A* devised his lands to his son *B*. and his male heir; but if he should have no male heir, then to his daughters; and if he should die without issue, then to the daughters of *A* Held, that *B* took an estate-tail. By the common law of *Connecticut*, an estate-tail became an estate in fee-simple in the issue of the first donee in tail.

In 1707, the *General Assembly* of *Connecticut* had not so far parted with their judicial authority as to preclude them from awarding new trials in subordinate tribunals.

MOTION for a new trial.

This was an action of ejectment by the plaintiffs, in the right of the wife, claiming title to the demanded premises as tenants in common with the defendant, and alleging an actual ouster and exclusive possession by the defendant.

The general issue was pleaded.

On the trial, it appeared, that *Joshua Hempsted* the first devised the premises by a will dated the 17th of *October*, 1683, to his son *Joshua Hempsted* the second, with this clause of limitation: "Which lands, (to say,) all the lands given him, shall accrue unto the heir male of my said son, and not to be alienated; but if it should please God, he should have no heir male, then it shall become his daughter and daughters; and if it should please God, he should die without issue, then to be divided among my daughters, all or so many of them, as shall be then living."

In 1689, the testator died. No executor being named in the will, *Elizabeth*, widow of the testator, took out letters of administration in 1690, and proceeded to settle the estate as an intestate estate.

On the 1st of *October*, 1706, the will was presented, by *Joshua Hempsted* the second, to the court of probate in *New-London* county, for probate, which was refused. The record of that court is as follows: "*At a Court of Probate, held in New-London, October the 1st, 1706.*"

"Mr. *Joshua Hempsted* appearing at this court, pre- June, 1809.  
sented the will of his deceased father, *Joshua Hempsted*, HAMILTON  
for probate; and this court, considering there is no ex- HEMPSTED.  
ecutor appointed in said will, and that the court have  
granted administration on said estate sixteen years ago;  
and also, there being two children of the testator now  
surviving, which were born since the will was made;  
for the above recited reasons this court do not see cause  
to give a probate to said will."

From this decree an appeal was taken, the record of  
which is as follows: "*Joshua Hempsted* has an appeal  
from this judgment to the court of assistants to be hol-  
den in *Hartford* in *May* next. He, the said *Joshua*  
*Hempsted*, acknowledges himself bound in a recogni-  
sance of ten pounds, current money of *New England*, to  
the public treasury of *Connecticut* colony, that he will pro-  
secute the abovesaid appeal to effect, and answer all da-  
mages in case he make not his plea good."

This appeal was entered at the court of assistants, in  
*October*, 1707, who thereupon proceeded to act on the  
same, and established the will. The record of their  
decree is as follows: "This court, considering the pre-  
mises, do approve and allow the said will to be the last  
will and testament of the said *Joshua Hempsted*, deca-  
sed, and that the disposition of his estate ought to be  
regulated by it; always provided, that the children born  
since the date of the will be allowed their portions out  
of the whole estate equal to the daughters born before  
the will was made, to be deducted out of the portions  
of all of them by proportion, according to what is allow-  
ed to each of them by the will." *Elizabeth*, the widow,  
and *Joshua*, the son, of the testator, were, at the same  
time, appointed administrators.

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In October, 1708, John Edgcomb and said Elizabeth, whom he had married, preferred a petition to the *general assembly* for a new trial, which, after a full hearing, was granted. The reasons, which the record assigns for this decision, are, first, that the appeal from the *court of probate* was entered, not at the next *court of assistants*, but at the next court *but one*; and secondly, that the appellees, now petitioners, had neglected to take a review of the decree, which they might have done.

In October, 1709, a new trial was had, before the *court of assistants*, and the will established, according to the principles of the decree made two years before. Joshua Hempsted the second then went into possession of the premises. His title was afterwards confirmed by releases from the other heirs and claimants.

On the 27th of November, 1758, he made his will, whereby he devised the premises to his grandson Joshua Hempsted the third, son of his eldest son, Nathaniel Hempsted, deceased, and "to the male heirs of his body lawfully begotten, by a succession for ever from generation to generation." This will, after the testator's death, was regularly proved and approved.

Joshua Hempsted the third died, seised of the premises, without a will, leaving sundry children, male and female, of whom Rebecca Hamilton was one. The defendant was son of the *eldest son* of Joshua Hempsted the third, and claimed under the second will as the heir to whom the estate was limited.

In support of this claim, he contended, first, that the will of Joshua the first was not legally proved and approved; secondly, that by the words of that will, Joshua the second took an estate in fee-simple; and lastly, that if



he took an estate-tail, it could not be inherited by a June, 1809.  
*female* defendant.

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The court instructed the jury, that the law was so, upon the facts which have been stated, that the will of *Joshua* the first was duly proved and approved; that the demanded premises were thereby entailed to *Joshua* the second; and that the estate became a fee-simple in *Joshua* the third, the issue of the first donee in tail.

The jury, in pursuance of these instructions, found a verdict for the plaintiffs; whereupon the defendant moved for a new trial. This motion was reserved for the consideration of the nine judges, before whom

*Law* and *Cleaveland*, for the defendant, insisted upon the same positions, which had been urged and overruled on the circuit.

1. The will in question was not exhibited for probate, until many years after the death of the testator. The *court of probate* then refused to allow it. From this sentence no regular appeal was taken. The statute then in force made provision for an appeal from any order, sentence, decree or denial, that should be made by the *court of probate*, referring to the approbation and allowance of any will, to the NEXT *court of assistants*, and to no other after. The proceedings on the appeal, which was taken to the next court *but one* were, therefore, void, being *coram non judice*. The subsequent proceedings of the *general assembly* could not remedy this defect. The rights of the parties had become *vested* in pursuance of the decree of probate. The *general assembly*, therefore, could not interfere in their *legislative* capacity; and as to the subject matter

June, 1809. of this application, they had parted with their *judicial* authority.

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2. It is clear, that by the *English* law, the words of this devise, in a *deed*, would not create an estate-tail. In a devise, it is true, their courts would give effect to the intent of the devisor. But there, the policy of the law is in favour of entailments. The policy of *our* law is opposed to them.

3. The law, at the time of making this will, was not so, that an estate-tail became a fee-simple in the issue of the first donee in tail. By the statute, which was then in force, and which had existed from a very early period of the government,(a) all persons were fully authorized to make *all lawful alienations* of their lands and other estates. To determine what was a "lawful alienation," reference must be had to the law of *England*. It was to this law that the framers of the act had reference, when they used those words. The law of *England* was our law, except where it had been altered by express statute, or where it was peculiarly opposed to the policy of our law. In practice, entailments have been regarded as operative here to the same extent as they are in *England*; and, in pursuance of this idea, tenants in tail in this state have suffered common recoveries.

*Gurley and Isham, contra.*

1. The will of *Joshua* the first was legally proved and established. The judgments of the *court of assistants*, both in 1707 and 1709, in express terms, allow and approve of the will, and direct that the disposition of the estate be regulated by it.

(a) Vide *Stat. Conn.* tit. 8. s. 1. and note (1).

It is said, however, that the devisee did not appeal to the *next* court, as he was bound by law to do, but to the next *but one*. This, we contend, is wholly immaterial. The *court of assistants* did take cognisance of the appeal; and their decision has never been reversed, or set aside. It cannot now be inquired into collaterally. *Bush v. Sheldon*, 1 Day, 170. Besides, the *general assembly*, on petition, ordered a rehearing for this very irregularity, among other things; and a second confirmation of the will took place, on such rehearing. That the awarding of new trials in the subordinate tribunals was a power, which the general assembly, even at a later period, had the right to exercise, has been settled, by a decision of the *Supreme Court of the United States*. *Calder et Ux. v. Bull et Ux*, 3 Dal. 386.

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2. The will in question gave an *estate-tail* to the devisee.

The intention of the testator is the pole-star, by which we are to be guided, in the construction of a will. Lord *Kenyon* says, "We almost spell every word in a devise to get at the intention of the testator." In the case of *Roe, ex dem. Dodson, v. Grew et al.* 2 Wils. 324. *Wilmot*, Ch. J. observed, that cases in the books upon wills had no great weight with him, unless they were exactly in the very point: the intention was the great thing which governed him. In this will, the intention of the testator is too obvious to require any remarks to evince it.

The language of this devise corresponds with the description of an *estate-tail* in *England*. The words "of his body" are not necessary in a will to create an *estate-tail*; it is sufficient, if the limitation be to the tes-



June, 1809. tator's *seed*, or his *heirs male*, or his *posterity*, or if any words are used which show an intention to restrain the inheritance to the descendants of the devisee. *Co. Litt.* 9. b. 27. a. 2 *Pla. Com.* 115. and note (10), by *Christian*. The court will supply the words "of his body." *Denn, ex dem. Slater, v. Slater, 5 Term Rep.* 335.

Further, in this will there is a limitation over: "But if it should please God he should die without issue, then to be divided among my daughters," &c. making an estate-tail, not by construction or implication merely, but technically so. A devise to one, and the heirs of his body, and *their heirs for ever*, creates an estate-tail, if qualified by the words, *in case he shall die without issue*. *Denn, ex dem. Geering, v. Shenton, Cowp.* 410.

3. Our statute regarding entailments was in affirmance of the common law. It was introduced at the revision in 1784, by the committee of revision, not for the purpose of changing the law, but of sanctioning an unwritten canon, by an explicit legislative provision.

But it is unnecessary to inquire what the law was before the passing of that act. It was clearly intended to have a *retrospective* operation. After declaring prospectively, that no estate, either in fee-simple, fee-tail, &c. *shall be given*, &c. it proceeds to declare, that all estates *given* in tail shall be and remain an absolute estate in fee-simple. *Chappell v. Brewster, Kirby,* 175.

BY THE COURT. The proceedings in the probate of the will are conformable to the usage and practice of that period; for the *general assembly* then exercised extensive judicial power, especially in granting new trials. And it would be of dangerous consequence to set aside such ancient proceedings, because they do not appear to be conducted with all the regularity of modern times.

In the construction of devises, the intent of the devisor, collected from the whole devise, is to be pursued, if that intent is consistent with the policy of the law. Though the words "*heir male in perpetual succession*" would comprehend his heirs male generally; yet, when taken in connection with the other words in the devise, that *if the devisee has no heir male, then to his daughters, and if no issue, then to the daughters of the devisor*, it is manifest, that the devisor intended the heir male of his body begotten; and that his object was to create an estate in fee tail.

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Our courts have never adopted the fee conditional at common law, nor the statute of *Westminster 2d*, called the statute *de donis*; but from the principle, that the law abhors a perpetuity, they have decided, that a deed or devise, using words proper to create an estate in fee tail, should vest an estate in fee-simple in the issue of the first donee in tail: And the statute on that subject has been considered to be in affirmance of the common law.

New trial not to be granted.

June, 1809.

## NATHANIEL HEMPSTEAD against JARED STARR.

*A.* on the eve of a failure, made a general assignment of his effects, and gave immediate possession, to *B.* one of his creditors, intrust to satisfy the debts due to *B.* and certain other meritorious creditors specified, and to pay over the surplus, if there should be any, to the creditors generally. *C.* and *D.* creditors not specially named, soon afterwards attached those effects in the hands of *B.* as the property of *A.* Held, that this conveyance was not by law fraudulent against the attachment of creditors.

## MOTION for a new trial.

This was an action of trover, for certain goods, wares, and merchandise, specified in the declaration.

The defendant pleaded the general issue.

On the trial, it appeared, that the plaintiff was an officer, and had taken the goods in question as the property of *Francis Hazard*, by virtue of three attachments against him. The defendant claimed them as his property, by virtue of the following bill of sale from *Hazard*: "Know all men by these presents, that I, *Francis Hazard*, of the town of *New-London*, in the county of *New-London*, and state of *Connecticut*, for the consideration of one thousand dollars, received to my full satisfaction of *Jared Starr*, of said town of *New-London*, have sold, transferred, bargained, assigned, and conveyed to the said *Jared Starr*, his heirs and assigns for ever, and by these presents, do bargain, sell, transfer, assign and convey to the said *Jared Starr*, and his heirs and assigns for ever, all the dry goods, groceries, hardware, crockery ware, and wet goods now in my store or stores in *New-London*, a schedule or inventory whereof is hereunto annexed, (a) for him the said *Jared Starr* to have and to hold the same to his and his heirs' own proper use and behoof for ever. And I hereby covenant to and with the said *Jared Starr*, that I have good right to bargain and sell the same, and bind myself and my heirs for ever, to warrant and defend the above bargained property and goods to

(a) There was a particular inventory of the several articles appended to the bill of sale, which it is unnecessary to insert here.



him the said *Jared Starr*, his heirs and assigns for ever. June, 1809.  
 Always provided, and these presents are upon condition, HEMP-  
 that whereas *Jared Starr*, *Daniel Douglass*, *Josiah Doug-* STEAD  
*lass*, *Reuben Langdon*, *Stephen Holt*, *Henry Truman*, and V.  
*Charles Hazard*, all of said *New-London*, have severally, STARR.  
 at my instance and request, endorsed my notes of hand,  
 and are liable to pay money on my account, the said  
*Jared Starr* for about the sum of two thousand dollars,  
 the said *Daniel Douglass* for about the sum of fifteen  
 hundred dollars, the said *Josiah Douglass* for about the  
 sum of six hundred dollars, the said *Reuben Langdon*  
 for about the sum of three hundred dollars, the said  
*Stephen Holt* for about the sum of one hundred  
 and fifty dollars, the said *Henry Truman* for about the  
 sum of fifteen hundred dollars, and the said *Charles*  
*Hazard* for about the sum of two thousand dollars. And  
 whereas also I am justly indebted to *Ebenezer Learned*,  
 of said *New-London*, in the sum of one hundred and fifty  
 dollars, or thereabouts, for money lent, and also to Mrs.  
*Jane Stewart*, of said *New-London*, for money lent to the  
 amount of one hundred and fifty dollars, or thereabouts,  
 and to *Jeremiah F. Jenkins*, of *Providence*, for goods  
 sold for him on commission, for about the sum of three  
 hundred dollars, and also to *Amos Cross*, of *Westerly*,  
 for money which I have borrowed of him to the amount  
 of three hundred dollars, or thereabouts. Now, if I well  
 and truly pay each of said notes, and save the endorsors  
 thereon, and every of them harmless from the payment  
 of any money on said notes, which they may endorse to  
 continue and run said old notes, and also well and truly pay  
 to each of said persons to whom I am indebted for bor-  
 rowed money, and for goods sold on commission, such  
 sums as I respectively owe them, then the above and  
 foregoing instrument to be void; otherwise, to be and  
 remain in full force, power and virtue. It being, how-  
 ever, always understood, and it is my intention therein,  
 that the residue or surplus of property, if any, after pay-

June, 1809. ing and discharging the above-mentioned debts to endor-  
 HEMP- sors, and those who have lent me money, shall be for the  
 STEAD use and benefit of all my creditors generally. In witness  
 V. whereof, I have hereunto set my hand and seal, this 5th  
 STARR. day of *March*, 1808.

*"Francis Hazard."*

This bill of sale was executed at the time it bears date, on the eve of *Hazard's* failure; and the goods specified therein were actually delivered to the defendant, and deposited in his store, before the morning of the next day, and before the service of the attachments by the officer. Mr. *Cleveland*, the attorney for the creditors, named as plaintiffs in the attachments, then went to the defendant's store, and informed him of their several demands, and that he should direct the officer to seize those goods as the property of *Hazard*. After this, in the forenoon of the same day, *Hazard* drew orders on the defendant, in favour of most or all those creditors, who were named in the bill of sale, which were immediately accepted by the defendant conditionally "to be paid as far as said goods should avail on the sale thereof." In the afternoon, the attachments were levied; but the goods were not removed from the defendant's store. It was admitted, that the creditors named in the bill of sale, and in the attachments, were *bonâ fide* creditors. The goods were sold by the defendant. On those facts, the court, in their charge to the jury, instructed them, that if a debtor, on the eve of a failure, make a bill of sale, or conveyance of his effects to one of his creditors, therein directing him to convert the same into money, and pay himself and certain other favourite creditors therein named, with this condition annexed, that if any surplus should be left, after discharging the debts due to such favourite creditors, it should be applied to the discharge of his debts

due to his creditors generally, such bill of sale or conveyance, is by law fraudulent, and invalid, against the legal attachments of creditors. They, therefore, directed the jury to find a verdict for the plaintiff; which was accordingly done.

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STARR.

The defendant excepted to this direction of the court to the jury; and thereupon moved for a new trial, which motion was reserved for the consideration of the nine judges.

*Goddard and Law*, in support of the motion.

1. There ought, at any rate, to be a new trial; because the case should have been left to the jury as a question of *fact*. The court should not have directed the jury positively, that this assignment was fraudulent in law; but should have submitted it to them to say whether it was fraudulent in fact. In *Estwick v. Caillard*, 5 Term Rep. 420. *Grose*, J. at the trial, left it to the jury to consider, whether a fraudulent transaction was proved; and the whole court sanctioned this direction, by refusing to set aside a verdict in pursuance of it. The ground they proceeded upon was, that there were no extrinsic circumstances to show that any fraud was intended. But if it was a mere question of law whether the conveyance was fraudulent, why should inquiry be made respecting *extrinsic circumstances*, and an *intention of fraud*? So, in *Ingliss et al. v. Grant*, 5 Term Rep. 530. Lord *Kenyon* stated, as the ground of the decision of the court, that the transaction was perfectly fair at the time, and without any fraudulent intention, and that the grantor acted honestly in executing the deeds. These are circumstances proper for the jury to consider, and decide upon.



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2. But admitting that it was competent for the court to direct the jury peremptorily on the question of fraud, we contend that the direction given was incorrect. Here we are relieved from most of the circumstances relied upon, in other cases, as badges of fraud. The property was actually delivered; the creditors were not only *bonâ fide*, but *meritorious* creditors; they were lenders of money, endorsors, and those who had intrusted goods to sell on commission. The only questions, which can arise, are, whether a debtor may, in this state, give a preference to any of his creditors; and whether a transfer to a trustee for certain creditors, is valid.

It is the policy of our law to give a preference to the vigilant creditor. If a debtor will not voluntarily give up his property to satisfy a debt when demanded, the law will compel him to do it, by attachment. What is done voluntarily by the party, ought to avail as much as what is done compulsorily by attachment. That the preference in this case was given on the eve of a failure can make no difference; for we have no statutes of bankruptcy, nor does the common law recognise the principles of such statutes. [SWIFT, J. said he considered it as settled, that a debtor may prefer his creditors; and the counsel did not pursue the argument on that point.]

No reason can be given why an assignment to trustees for the benefit of creditors should not be as valid as to the creditors themselves, except that the assent of the creditors is wanting, or that the assignor retains some control over the property.

As to the first of these, it is sufficient to observe, that the assent of the creditors will be presumed until their dissent be shown. In *The Countess of Gainsborough v. Gifford*, 2 P. Wms. 424. 430. the assignee did not know of the assignment; but this was held to be no objection

to its validity. *Atkin v. Barwick*, 1 *Stra.* 165. is to the same effect. The *Chief Justice* said, that in such case, the contract does not stand open till agreement, but is complete. unless there is an actual disagreement. But from the statement of the principal case, it appears, that there was an actual assent of the creditors, as they took orders in their favour, drawn by *Hazard* on the defendant.

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In the next place, what control had *Hazard* over this property, after making the assignment? We answer confidently, none at all. No part of it was ever to revert to him, or be subject to his direction. By the terms of the deed of assignment, it was to be applied, in the first place, to the payment of the claims of certain creditors therein named, and then, if there should be a surplus, it was to go to the creditors generally. The defendant had a perfect right to sell it, or control it at pleasure, until his own debt, and the debts of the other creditors, were paid.

*Cleaveland* and *Gurley*, contra, relied principally upon this ground: That *Hazard* made a general conveyance of his effects for the benefit of *all his creditors*, and that some of those creditors *dissented*, and attached. The conveyance, of course, could not be valid with respect to any. In the cases cited by the counsel for the defendant, all the creditors assented, (or it was so presumed,) and claimed the benefit of the assignment.

They also contended, that this general conveyance, upon the eve of a failure, was a fraud upon the attachment law of this state. Where the object is to evade that law, the act is void, just as it would be in *England*, if it operated as a fraud upon the bankrupt law. *Brown's Executors v. Burrell*, 1 *Root*, 252. and *Hovey v. Clark*, *ibid.* were cited. [SWIFT, J. said, the case of *Hovey v.*

June, 1809. *Clark* was incorrectly reported: No sort of inference ought to be drawn from it.]

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BY THE COURT. The bill of sale is not on the face of it fraudulent, although the whole transaction may have been a fraud as against creditors.

The facts disclosed on the motion do not warrant the decision of the court, that the bill of sale and conveyance was by law fraudulent against the attachment of creditors, nor the charge to the jury on that point.

New trial to be granted.

SILAS P. HALSEY *against* JESSE BROWN, JESSE BROWN, jun. ZEBULON P. BURNHAM, and DYER PERKINS.

In an action against the owners of a vessel, for a quantity of gold and silver coin, taken by the master at *Nevis*, on freight, evidence of a custom of merchants in *Connecticut* and *New-York*, that the freight of money received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners, was held to be admissible.

MOTION for a new trial.

This was an action of *assumpsit*, brought against the defendants as owners of the brig *Eliza*, for 65 penny-weight of *Portuguese* and *Spanish*-gold, and 100 *Spanish* milled dollars, shipped by the plaintiff at *Nevis*, on board said brig, to be transported, and delivered to a mercantile house in *New-London*, for which the master gave the plaintiff a bill of lading in the usual form.

The defendants pleaded the general issue.

On the trial, the defendants offered to prove, that there was a usage or custom of merchants existing in the state of *Connecticut*, and at *New-York*, that the freight of money received by the master of a vessel was his perquisite; that he was to be compensated for the trans-



portation of it, and not the owners of the vessel; and that the contract was considered as being personal, and of individual obligation, but not as the contract of the owners. To the admission of this evidence the plaintiff objected. The court overruled the objection, and admitted the evidence. The defendants thereupon obtained a verdict; and the plaintiff moved for a new trial. The question being reserved for the opinion of the nine judges,

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*Hoar* argued in support of the motion.

1. The law rendering the owners liable for goods received by the master to be transported is *settled*. The contract of the master is the contract of the owners; his non-delivery is their non-delivery. The maxim applies here *respondeant superiores*. *Abbott*, 88—94. *Ellis v. Turner*, 8 Term Rep. 533.

2. The law upon this point being settled, no usage of merchants could be admitted. Usage is admissible only in explanation of *doubtful* points. *Edie et al. v. East-India Company*, 2 Burr. 1216.; particularly the opinions of Lord Mansfield, p. 1224. of Justice Denison, p. 1226. and of Justice Foster, p. 1228. *Marsh. on Ins.* 609.

3. If proof of any usage were admissible to the point under consideration, still the usage proved in this case was inadmissible. The contract was entered into at *Nevis*, a foreign country. The usage of merchants in *Connecticut* was perfectly irrelevant as to the construction to be given to it. *Robinson v. Bland*, 2 Burr. 1078. This contract was not made *with a view* to the laws of this state; much less with a view to any special usage.

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Further, evidence was admitted to prove the usage of *New-York*. The contract was not made there; it was not to be performed there; neither of the parties lived there. The usage of *Kamfschatka* might as well have been admitted:

4. But it will be said, that the master was to receive the freight. That this circumstance makes no difference is settled by the case of *Boucher v. Lawson*, *Cas. temp. Hardw.* 85. *Abbott*, 89. This perquisite diminishes the *wages* of the master; and, in that way, goes to the benefit of the owners.

*Goddard, contra.*

There is no question before the court as to the liability of the owners. The court did not instruct the jury, that the usage was to control the law. The objection to the evidence was merely, that it was *irrelevant*. To support the objection, it must be shown, that the evidence could not be admitted to prove any case, which could be made out under the declaration.

[SWIFT, J. The question which was meant to be reserved was, whether this usage could be admitted to explain the law.]

*Goddard* then contended, that no case was to be found, embracing the circumstances of this case, in which the owners had been held liable; and that it was proper to show the general usage and understanding of merchants in this state, where the defendants lived, in order to get at the true construction of this contract. Having shown the usage here, what objection could there be to proving that it existed at *New-York* also? Does the universality of the usage render it the less proper to be received? Its existence at *New-York* came in incidentally.

By THE COURT. The question in this case is, whether evidence of a particular custom or usage can be given in evidence to control a general law.

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The general law applicable to the commercial world, that owners of vessels are answerable for the contracts and conduct of their masters, when acting within the scope of their authority, must be admitted. But as it is a principle, that the general common law may be, and in many instances is, controlled by special custom; so the general commercial law may, by the same reason, be controlled by a special local usage, so far as that usage extends; which will operate upon all contracts of this nature, made in view of, or with reference to, such usage.

We are, therefore, of opinion, that the evidence offered to prove the particular usage in this case was admissible.

New trial not to be granted.

ISAAC STOYEL against AMOS WESTCOTT, jun.

WRIT of error.

This suit was originally commenced in August, 1805, and was brought before this court, on a writ of error, in June, 1807; when the judgment of the superior court was reversed, for the insufficiency of the declaration. An action sounding in tort against A. an inhabitant of the state of Rhode-Island, and B. an inhabitant of this state, being brought to the county court, A. did not appear, nor put in a plea, but B. appeared and pleaded to the action, and judgment was rendered, at the first term, in favour of the defendants; the plaintiff then appealed to the superior court, and there had judgment in his favour: Held, that the proceedings of the county court were void, and the judgment of the superior court erroneous, being rendered without regular process in the cause.



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tion.(a) The cause being remanded to the superior court, and entered on reversal, the declaration was amended by stating the date of the writ by virtue of which *Westcott* arrested *Stoyel*, and the court to which that writ was made returnable. *Stoyel* then pleaded anew, (*Carder* having died since the commencement of the suit,) the plaintiff replied, and the pleadings terminated in a demurrer. The court gave judgment for the plaintiff. The defendant then brought this writ of error, setting forth the whole record in the court below. A new ground of error being now relied upon, it becomes necessary to state, that this action was brought against *Stoyel* and *Carder*, by a writ of attachment dated the 8th of *August*, 1805, returnable to the *Windham* county court, on the third *Tuesday* of that month; that *Stoyel* was described as "of *Foster*, in the county of *Providence*, and state of *Rhode-Island*," and *Carder* of *Killingly*, in *Windham* county; that service was made by attaching property, and leaving a copy with *Carder*; and that the writ was duly returned. The record of the county court, so far as it respects the appearance and pleadings of the parties, and the judgment thereon, is as follows:

"The defendant (*Carder*) in court, defends, pleads, and says, that the plaintiff's declaration, and the matters therein contained, are insufficient in the law; all which he is ready to verify, and thereof prays judgment.

"*Parish*, for said *Carder*.

"The plaintiff says his declaration is sufficient.

"*Backus* and *Learned*, for the plaintiff.

(a) *Vide 2 Day*, 418.

" *Windham*, ss. *County Court*, *August term*, 1805.

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" *Amos Westcott*, jun. of *Killingly*, in the county of *Windham*, plaintiff; *William Carder*, of said *Killingly*, and *Isaac Stoyel*, of *Foster*, in the county of *Providence*, and state of *Rhode-Island*, defendants.

" In a plea of the case, demanding one thousand dollars damages, with cost, as *per writ* on file, dated *August 8th*, 1805. The parties appeared; the defendant *Carder* in court demurred to the declaration of the plaintiff; and the plaintiff joined in said demurrer, as on file. This court are of opinion, and adjudge, that the declaration of the plaintiff is insufficient in law. Thereupon it is considered by this court, that the defendants recover of the plaintiff their cost." The plaintiff appealed to the superior court. The history of the cause subsequent to that period, has already been given.

*Staples* and *Evarts*, for the plaintiff in error, contended, that the judgment ought to be reversed on the following grounds:

1. That the declaration was still bad: first, because the writ by virtue of which *Westcott* arrested *Stoyel*, as set forth, gave him no authority to make the arrest; secondly, because matters were joined in the declaration which cannot be joined.

2. That the plea in bar was a complete answer to every material allegation in the declaration; as it contained direct and positive allegations, which it was necessary to demur to, or traverse, or avoid by new matter.

3. That the replication was clearly bad; but yet admitted in terms the truth of the plea in bar as pleaded.

June, 1809. 4. That the superior court could not render any judgment against *Stoyel*, as the cause was not regularly before them.  
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To all these exceptions *Daggett* and *Goddard*, for the defendant in error, replied; and the case was very fully argued on both sides. But as the decision turned solely on one of the points, and that least considered by the counsel, a particular report of the arguments is deemed unnecessary.(a)

By THE COURT. It appears from the record in this case, that *Stoyel*, one of the original defendants, was an inhabitant of the state of *Rhode-Island*; that judgment in the county court was rendered the term to which the action was brought, without any appearance on the part of *Stoyel*, or plea put in by him; and that he was in no way party to the cause, until after the same was appealed, and entered in the docket of the superior court. The proceedings of the county court were therefore void;(b) and the cause in the superior court was in the same situation as any other cause would be entered there without process. The proceedings and judgment of the superior court must, as a necessary consequence, be erroneous, and ought to be reversed.

Judgment reversed.

(a) For the same reason a particular statement of the pleadings in the superior court is omitted.

(b) *Vide Stat. Conn.* tit. 6. c. 1. s. 3. by which it is provided, that "if the party against whom suit is brought, is not an inhabitant, or a sojourner, in this state, or is absent out of the same, at the time of commencing such suit, and doth not return before the first day of the court's sitting, the judges of the court where such suit is brought, shall continue the action to the next court; and if the defendant doth not then appear, (by himself or attorney,) and be so remote, that the notice of such suit depending could not probably be conveyed to him during the vacancy, the judges, at such next court, may further continue the action to the court thence next following, and no longer, but may enter up judgment on default after such continuance, or continuances."



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JOHN MOWATT, jun. *against* JOSEPH HOWLAND,  
JOSEPH HOWLAND, jun. and JESSE BROWN.

MOTION for a new trial.

This was an action of *assumpsit*, in which the plaintiff declared, as the holder of a bill of exchange, against the defendants as endorsors.

The *Howlands* suffered a default. *Brown* appeared, and pleaded the general issue.

On the trial, the drawing, non-acceptance, and notice, were proved as stated in the declaration. The only question was, whether the endorsement was so made as to render *Brown* liable. The facts were these: A partnership had existed, by the name of *Joseph Howland & Co.* consisting of *Joseph Howland* and *Joseph Howland, jun.* of *New-York*, and *Jesse Brown*, of *Norwich, in Connecticut*. Their usual place of doing business was at *Norwich*. On the 14th of *May*, 1806, they dissolved their partnership, and published notice of such dissolution, for several weeks successively, in two newspapers, one in *Norwich*, the other in *New-London*. The settlement of the company concerns was immediately committed to *Brown*; and the company name extinguished at the banks, and insurance offices, and the dissolution there publicly known. The plaintiff lived in *New-York*; but whether he had, or had not, actual notice of the dissolution did not appear; nor did it appear, that he had ever been a correspondent of the company. On

*A. and B. of New-York, and C. of Norwich, in Connecticut, having been partners in trade, dissolved their partnership, and published notice of such dissolution, for several weeks successively, in two newspapers, one printed at Norwich, which was their usual place of doing business, and the other at New-London, in the vicinity of B afterwards endorsed a bill of exchange in New-York with the company name; but whether the endorsee had, or had not, actual notice of the dissolution did not appear; nor did it appear, that he had ever been a correspondent of the company. Held, that these facts constituted reasonable notice to him, and to every other person not a correspondent of the company.*

The facts, which are supposed to constitute notice of a dissolution of partnership being ascertained, it is a question of *law* whether the notice be reasonable, or not.

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the 20th of *August*, 1806, *Joseph Howland, jun.* endorsed the bill in question, in *New-York*, with the late company name, without the knowledge of *Brown*. Upon these facts, the superior court instructed the jury, that *Joseph Howland, jun.* was not authorized to make the endorsement with the company name; and that *Brown* was not liable. The jury thereupon found a verdict for the defendants; and the plaintiff moved for a new trial, on the ground of a misdirection. This motion being reserved for the opinion of the nine judges at this term,

*Daggett* argued in support of it, on two grounds.

1. That the notice of dissolution was not sufficient. It should have been advertised in *New-York*. Newspapers printed in *New-London* and *Norwich*, cannot be presumed to be read in *New-York*. In *Gowram v. Hope et al. Esp. Dig. 776. Dub. edit.* Lord *Kenyon* held, that notice in the *London Gazette* alone was not sufficient, but that particular notice by letter or message should be given besides to all persons having had antecedent dealings with the firm. But that case goes much further than is necessary for our purpose. The *London Gazette* circulates through the mercantile world. It is in the mercantile world what the government paper is in the political world. Would there have been a question, if, in the case cited, notice had been given only by an advertisement in a provincial paper? *New-York* is the emporium of business for *Connecticut* merchants. If notice may be dispensed with *there*, it may be *everywhere*. In *Gorham et al. v. Thompson et al. Peake's Cas. 42.* it appeared, as in this case, that the dissolution was generally known in the neighbourhood. But Lord *Kenyon* said, this was not sufficient; the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. His lordship subjoins a

very satisfactory reason. "It would be the hardest measure imaginable upon the creditor," says he, "were the law otherwise; for while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demand, he might be trusting a beggar." June, 1809.  
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2. That at least it should have been left to the jury to decide whether the plaintiff had notice of the dissolution. All the circumstances respecting the question of notice, the extent of the partnership transactions, of the circulation of the *New-London* and *Norwich* papers, and of the plaintiff's means of information on the subject, ought to have been submitted to the jury. In *Godfrey v. Turnbull and Macauley*, 1 *Esp.* 371. the question was, whether the evidence of notice, which was an advertisement in the *Gazette*, was sufficient. Lord *Kenyon* did not deem it correct to decide upon its sufficiency in point of law, but left it to the jury to make their own inference. The jury are to judge, he added, from the practice in the usual course and ordinary mode of business. In the principal case, the court ought to have said, that an advertisement in the *New-London* and *Norwich* newspapers was, *per se*, sufficient notice to *Mowatt* in *New-York*.

*Goddard*, contra, insisted, that notice of a dissolution of partnership in the newspapers, printed at and in the vicinity of their usual place of doing business, was sufficient, in point of law, to all persons, who had no previous dealings with the firm. As it did not appear, in the present case, that the plaintiff had ever had any such previous dealings, he must be taken to be within the rule. The opinion of Chief Justice *Kent*, in *Lansing v. Gaine* and *Ten Eyck*, 2 *Johns. Rep.* 304. was cited as precisely in point, and entitled to great consideration. *Graham et al. v. Hope et al.* *Peake's Cas.* 154. *Gorham et al. v. Thompson et al.* *Peake's Cas.* 42. and *Abel et al. v.*



June, 1809. *Sutton*, 3 *Esp.* 108. were also read, and commented upon.

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BY THE COURT. Whether *Joseph Howland, jun.* was authorized to make the endorsement by the name and firm of *Joseph Howland & Co.* depends upon the question, whether there had been reasonable notice of the dissolution of the partnership previous to making the endorsement. When the facts, which are supposed to constitute notice, are once ascertained, it is altogether a question of law, whether the notice was reasonable, or not; and, in such case, there is nothing to be left to the jury.

The facts agreed to, on the statement in this case, in the opinion of the court, do constitute reasonable notice to every person not a correspondent of the company. The direction of the superior court was correct; and, therefore, this court do not advise a new trial.

New trial not to be granted.

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FREEMAN KILBOURN *against* SARAH BRADLEY.

If a usurious security be given up, and a new security taken, for the principal sum due, and legal interest, the latter will be good

MOTION for a new trial:

This was an action of ejectment.

The demanded premises had been mortgaged by *Aaron Bradley*, under whom the defendant claimed, to

The moral obligation, which the borrower of money at usurious interest is under, to pay the principal sum due, and legal interest, is a sufficient consideration to support a promise by him to pay such principal and interest.

the plaintiff, as collateral security for the payment of a promissory note for 1,616 dollars and 75 cents, and interest. June, 1809.

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The defendant in her plea alleged, that this mortgage was made upon a corrupt and usurious agreement, which was set forth specially, in substance as follows: On the 10th of *May*, 1796, *John Bishop* applied to the plaintiff for the loan of 5,020 dollars, for one year. The plaintiff refused to make the loan, unless *Bishop* would purchase of him a pair of sorrel horses, worth 200 dollars, at the price of 500 dollars, and add that sum to the money loaned; and would give his promissory note for the amount, payable in one year, with interest, endorsed by *Jacob Ogden* and *Aaron Bradley*. These terms were acceded to, and complied with, by *Bishop*. Before the 31st of *January*, 1799, he paid the whole sum contained in the note, and interest to that time, except 1,500 dollars, and then failed; in consequence of which the plaintiff called upon *Bradley* to pay or secure the sum unpaid. *Bradley* accordingly gave the plaintiff his promissory note for that sum, and interest. On the 13th of *May*, 1800, the plaintiff called on him for payment; but not being able to make payment, at that time, he agreed with the plaintiff to give a new note for the principal and interest of his former one, the amount being 1,616 dollars and 75 cents, and to secure the same by a mortgage of the premises; which was accordingly done.

The replication contained a general traverse of the several matters alleged in the plea; on which issue was joined.

On the trial, it was contended by the defendant, that there was usury contained in the first mentioned note; and that the second note, secured by the mortgage, was given for the payment of part of the consideration of the first; and, of course, usurious. The plaintiff contend-

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**BRADLEY.** ed, that no usury was reserved in the first note; and although it should be found, that usury was reserved therein, yet that it was proved, that upon the giving of the second note, which was secured by the mortgage, and which grew out of the first, all usury reserved in the first note was given up by the plaintiff, and never received by him; and, of course, no usury was reserved in the second note. The court directed the jury, that if they should find no usury in the first note, to find a verdict for the plaintiff; and that, although they should find that the first note was usurious, yet if they should find, that upon giving the second note, all usury in the first note was abandoned by the plaintiff, and never received, nor any part thereof reserved in the new note, they should, in that case, find a verdict for the plaintiff.

The jury returned a verdict for the plaintiff, therein finding, that the matters alleged in the defendant's plea were not true, nor were any of them true. The defendant thereupon moved for a new trial; and the court reserved the motion for the opinion of all the judges.

*Daggett and N. Smith*, in support of the motion.

The direction of the court to the jury consists of two parts. . To the first, we take no exception. The second, we contend, is erroneous; and it is not the less so, because it does not appear from the statement contained in the motion, but that the facts in the case were such, as to warrant the verdict which was found, in conformity to the first part of the direction, without regard to the second. But one verdict was found; and that was upon the whole case. If the second part of the direction was correct, the facts to which the first related were perfectly immaterial. As to these facts, the jury might say, we will not inquire, since it is fully proved, that upon the giving of the new note, all usurious inte-



rest, if there was any originally, was expunged. If an erroneous charge has been given to the jury, which might have had an influence on their verdict, this court will grant a new trial.

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In the *English* courts, it has been determined, and is now settled, that a new security, substituted for one originally usurious, is void. This point was expressly decided in *Tate v. Wellings*, 3 *Term Rep.* 537. Lord *Kenyon* said, as the former bond mentioned in the case was the consideration of the one on which the action was brought, if *that* were void as being given for a usurious consideration, most undoubtedly the latter would be also void. In the celebrated case of *Walton v. Shelly*, 1 *Term Rep.* 296. it was taken for granted, both by the bench and the bar, that if the two promissory notes, the delivering up of which was the consideration of the bond on which the action was founded, were contaminated with usury, the bond was void. In *Cuthbert et al. v. Haley*, 8 *Term Rep.* 390. it was admitted, that if the bond, and the notes for which the bond was substituted, had been between the same parties, the bond would have been void.

But admitting, that the second note cannot be considered as a continuation of the first, the *consideration* of the second was, at any rate, usurious. What was that consideration? Money due on a former contract to pay more than lawful interest. It makes no difference, whether it was for a part, or for the whole, of the money so contracted to be paid. The whole, and every part, was contaminated with usury. Take, however, the supposition, that those notes were partly good, and partly bad; it will still be difficult to distinguish one part from the other. You cannot put an *ear-mark* upon the illegal part.

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But what would be the consequence, if the usurious part could be distinguished, and separated from the rest. If any thing, it would be this; that in every case where the illegal part was not actually reserved in the security, such security would not be usurious. A usurer taking a note for the principal and legal interest, and trusting to a parol promise, and the honour of the borrower, for a usurious premium, would stand on safe ground. Nay, if he should take two notes, one for the legal, and another for the illegal part, he might recover on the former, after the latter had been avoided for usury.

The consideration of the new security is the same, as far as it goes, as that of the old. It is not so large; but that is all the difference.

The case of *Barnes et al. v. Headly et al.* 1 *Campb. Cas.* 157. is directly in point; and though decided at *nisi prius*, it was on an issue out of chancery, and was well considered. There the transaction was originally usurious. A compromise afterwards took place between the parties; by the terms of which, all the usurious interest was to be struck off, and a further time allowed for the payment of the principal sum advanced, with legal interest. An agreement to this effect was accordingly signed, and all the former securities and accounts between the parties were destroyed. *Chambre, J.* held, that this agreement was void, as being given for the payment of *principal* whereupon usury had been reserved.

It is laid down by *Powell*, as an undoubted proposition, that wherever the consideration, which is the ground of the promise, or the promise itself, is unlawful, the whole contract is void. 1 *Pow. on Cont.* 176.

The counsel for the defendant then cited the cases of *Steers v. Lashley*, 6 Term Rep. 61. *Booth v. Hodgson*, 6 Term Rep. 405. *Mitchell v. Cockburn*, 2 Hen. Bla. 379. *Ex parte Mather*, 3 Ves. jun. 373. and *Aubert v. Maze*, 2 Bos. & Pull. 371. to show, that a claim, which originated in an illegal transaction, cannot be supported. The courts cannot enforce a contract in the face of law, because a party to such contract may be under a moral obligation to perform it.

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*Terry, contra.*

1. The finding of the jury is such, that the court cannot say that there shall be a new trial, although there should have been a misdirection; because the finding shows, that the direction could have no influence on the verdict. The plaintiff denies the truth of all the matters alleged in the plea. The jury have found them all, and every part, to be untrue. There was nothing, then, for the opinion of the court to operate upon. Suppose the pleadings had been such, that the jury might have given a verdict, saying, in terms, that the first contract was not usurious. Then there would clearly be nothing for the opinion of the court to operate upon. But the jury have found that the first contract was not usurious. That they have found so with regard to the other part makes no difference.

2. In the next place, we deny that the court below did misdirect the jury on the question of law.

Let it be kept in mind, that the exception to the second note is, that it was *usurious*; not that it was void for want of consideration. The defendant must be holden to the sole ground, that the note was usurious. This is his plea. He avers, that the first note was usurious, and that the second was a continuation of the first. On



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this ground alone, the direction of the court to the jury proceeded; and on this ground alone, the defendant moved for a new trial.

The question is, what is a continuation of the contract? If the usury be expunged, and the borrower, from a sense of moral obligation, give a new note, this is not a continuation. It cannot require much argument to prove, that there may exist a moral obligation to pay borrowed money. The law destroys a usurious contract, not because it is immoral, but because it is inconsistent with the policy of the law. Even the statute against usury, while it renders void the contract, and inflicts a penalty upon the receiver, recognises the duty of the borrower to pay the principal sum borrowed. By the 9th and 10th sections, it is provided, that the obligor in a usurious security may file his bill in chancery, and obtain a decree for payment of the principal only. But chancery would never enforce such payment, if the party were under no moral obligation to pay. Further, it is evident from the relief, which the statute provides in such case, that the law does not consider the principal as contaminated whenever it can be separated from the usurious part.

The second note was not given for the purpose of carrying into effect the original contract. *That* was abandoned by the parties. The second contract was entered into by *Bradley*, in consideration of his having been benefited by the money loaned to him by *Kilbourn*. If he was under a moral obligation to pay this money, as I have endeavoured to show that he was, the consideration was undoubtedly good, and the contract neither usurious, nor a *nudum pactum*.

Suppose *Kilbourn* had given up the first note, by taking only the principal and lawful interest. He could not then be subjected to any penalty. Here, again, the

idea of a separation is clearly recognised. Suppose he had then lent the same principal and lawful interest for a longer period, and taken a note as security. Could it be pretended, that it would be usurious to *lend* the same money, which it was not usurious to *take*? But the case supposed is precisely the case before the court.

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The counsel for the plaintiff commented minutely upon the case of *Barnes et al. v. Headly et al* 1 *Campb.* 157. He contended, that the decision of *Chambre, J.* turned upon a verbal criticism, which made nonsense of the statute. "*Contracts, whereby there shall be reserved,*" &c. is intelligible; but "*any principal, whereby there shall be reserved,*" &c. is not. If Mr. Justice *Chambre* is not a better *lawyer*, than this reporter makes him a *grammarian*, his opinions will not have much weight. "*Contracts* is obviously the antecedent, to which the relatives whereupon" and "whereby" refer. The decision of Mr. Justice *Lawrence*, in *Wright v. Wheeler*, 1 *Campb.* 165. *in notis*, rests on higher ground. His reasoning is clear and just; it is unanswerable, and directly in point for the plaintiff.

BY THE COURT. The statute against usury, on principles of public policy, renders void contracts upon usurious consideration. But the lender incurs no penalty, unless he actually takes usury; and courts of equity, on relieving against oppression or extortion, order the repayment of the sum really loaned, or due, with the lawful interest. The moral obligation of the borrower to repay the principal sum actually loaned, with the lawful interest, is unimpaired. If the lender will expunge the usury, and the borrower voluntarily assents to repay the sum loaned with lawful interest, it is an act of justice forbidden by no principle of public policy, and which constitutes a good consideration for a new contract.

New trial not to be granted.

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TUDOR WOODBRIDGE & Co. *against* TIMOTHY P.  
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MOTION for a new trial.

In the assignment of a book debt, notice to the debtor is indispensable; for until such notice is given, the property remains in the assignor's possession, and is liable for his debts.

This was a *scire facias* against the defendant, as the agent, attorney, factor, trustee and debtor of *John T. Duryee*, of *New-York*, an absent and absconding debtor.

The defendant pleaded, that he was not the agent, &c. of said *John T. Duryee*, nor had he any effects of said *Duryee* in his hands.

On the trial to the jury, it appeared, that the plaintiffs left a copy of their writ against *Duryee* with the defendant on the 11th of *October*, 1806. Prior to the 21st of *July*, 1806, the defendant was indebted to *Duryee*, on book, to a larger amount than the plaintiffs' claim. On that day, *Duryee* executed a deed of assignment of his debt against the defendant to *Joshua Waddington* and *James Thompson* of *New-York*, as security for a large debt due to them, with a power of attorney to collect and receive the money. The defendant had no notice of the assignment until the 13th of *October*, 1806, two days after he was served with a copy of the plaintiffs' writ. Under these circumstances, the plaintiffs contended, that the assignment was ineffectual, and they were entitled to recover. *Waddington*, in the name of the defendant, insisted that the assignment was sufficient to protect his interest in the debt against the claim of the plaintiffs. The court decided, and so instructed the jury, that the plaintiffs were entitled to recover, on the ground that the defendant had no notice of the assignment until after service of the plaintiffs' pro-



cess; and, therefore, directed them to find a verdict for the plaintiffs; which they accordingly did. June, 1809.

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The defendant then moved for a new trial, on the ground of a misdirection; and the court reserved the question for the consideration of the nine judges.

*N. Smith* and *Bristol*, in support of the motion.

There is no question as to the power of *Duryee* to transfer his interest in this debt to another; nor is it denied, that the instrument executed for this purpose was appropriate and legal in its form. Why, then, did not the property vest immediately in the assignees? Because, it is said, that no notice was given to the debtor. But could not the property *pass* without such notice? Is notice an essential part of the transfer? There can be but two parties to the transfer; the party who makes it, and the party to whom it is made. It is a contract between them, and them only. When *their minds meet*, the contract is formed. It is not pretended, that the debtor is entitled to any voice in the transaction. His assent is not requisite. The transfer depends solely upon the deed of assignment. The want of notice only leaves it in the power of the assignor to deprive the assignee of any benefit of the assignment. The debtor will be protected in payment to his original creditor, so long as he is ignorant that any one else is entitled to receive payment. It will, therefore, be prudent for the assignee to give notice for his own security; (*Jones v. Gibbons*, 9 Ves. jun. 410.) but the transfer has taken place, when the notice is given. This is implied in the very notice given; which is, that the debt *has been assigned*.

Further, if notice be an essential part of the contract, the assignee could not hold until notice given, though

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there should be no *laches* in giving notice. The assignment, in this case, was made in *New-York*, on the 21st of *July*. Suppose the assignees had immediately despatched a messenger with notice to *Perkins*; but before he could possibly arrive at *Hartford*, though subsequent to the assignment, the creditors of *Duryee* had attached this debt. Upon the principle contended for, they would hold against the assignees. This, we apprehend, would be going great lengths.

In *Unwin v. Oliver*, cited 1 *Burr.* 481. no notice was given, and yet the transfer was held good. The same observation is applicable to *Winch v. Keeley*, 1 *Term Rep.* 619. The replication in that case does not state that any notice was given. In *Ryall v. Rolle*, 1 *Atk.* 165. the conveyance was not impeached on the ground of want of notice.

The argument derived from the plaintiffs' having the legal title proves too much: It proves, that they would hold *after* notice given; for *Duryee* still has the legal title. The suit for the debt must be brought in his name after notice as well as before.

Have the plaintiffs disclosed any facts, by which they show, that this transfer was *fraudulent* as against them? We do not controvert the position, that a sale of personal property, which is left in the possession of the vendor, is fraudulent. But there is no analogy between that class of cases and this. As to personal property, the reason of the rule is, from *Twyne's* case in *Coke*, to the 9th of *East*, that leaving it in the possession of the vendor is an *actual fraud*: It *deceives* creditors. But here *Duryee* did not exercise any acts of ownership over the debt after the assignment. He deceived, and could deceive, no one. The case is as free as any case can be from actual fraud. The direction of the court

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goes this length—that in every possible case of an assignment of a debt, notice must be given to the debtor, as soon as the relative situation of the parties will admit of, or the assignment will be fraudulent as against the creditors of the assignor. To vindicate this direction, it must be shown, that the omission to give notice is a fraud *per se*. But want of notice, *ex natura rei*, is at most a *fact* from which fraud is to be inferred. Whether there was fraud, or not, in any transaction, must necessarily be a question of fact. In cases of fraudulent conveyances, the several *badges* of fraud do not constitute fraud *per se*. The statute 21 Jac. I. c. 19. s. 11. makes the *possession* of property by the bankrupt, of which he is the reputed owner, and over which he exercises acts of ownership, subject to the disposition of the commissioners, as though it were the property of the bankrupt. This provision would have been unnecessary, if the statute of 13 Eliz. had rendered such possession a fraud *per se*. Even in *Edwards v. Harben*, 2 Term Rep. 587. which carried the rule to its extent, it was admitted, that the nature of the possession may be *explained*. This shows, that it is only a *badge* of fraud. It is the constant practice of judges at *nisi prius*, in cases of possession, after an absolute sale, to leave it to the jury as a *question of fact*, whether there was fraud in the transaction. Thus did Lord Eldon, in *Kidd v. Lawlinson*, 3 Esp. 52. and the jury finding that there was no fraud *in fact*, gave a verdict for the plaintiff, which the court of *common pleas* afterwards refused to set aside. 2 Bos. & Pull. 59. In *Hoffman v. Pitt*, 3 Esp. 22. Lord Ellenborough said, the not taking possession was, in some measure, indicative of fraud, but was not conclusive. To make it absolutely void, there must be something, that showed the deed fraudulent in the concoction of it.

Again, can the court say what is *reasonable notice*



June, 1809. from *New-York to Hartford?* This, also, is a question of *fact*? What if some accident has intervened? What is reasonable notice is never a question of law, except with regard to bills of exchange; and that exception rests upon mercantile principles.

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*Daggett and S. Smith, contra.*

It is a general rule of law, that a sale of personal property, though upon good consideration, is fraudulent and not valid, as against the creditors of the vendor, unless the contract of sale is accompanied and followed by transfer of possession to the vendee: possession being the only mark, by which the ownership of goods can be known. The same *policy* from which originated the law requiring that transfers of real property should be rendered notorious by the delivery and recording of deeds, would also seem to require that the sale of personal things should be attended with as much notoriety as is practicable, without subjecting such transactions to an inconvenient restraint; since it is equally necessary in the one case, as in the other, to guard against those impositions which might be practised, by reason of a false appearance of wealth.

In the present case, we will inquire, if such be the general rule, to what extent it is applicable to contracts respecting the sale of personal things; and whether assignments of *choses in action* are not comprehended within the same rule; so far it can be made to operate, at once, on things in possession, and things merely in action. And also, whether this case can justly be excepted from the operation of the rule, upon any principle which has yet been established.

As to the existence of the rule. It was resolved in *Twyne's case*, 3 Co. 80. that the gift there in question had divers marks of fraud, among which were "*that*

*the donor continued in possession, using the goods as his own;*" and that "*there was a trust between the parties; for that the donor possessed all, and used them as his proper goods.*" Lord Coke adds, as a caution to purchasers, "*immediately after the gift, take possession of them; for continuance of the possession in the donor is a sign of trust.*" In the case of *Ryall v. Rolle*, 1 *Atk.* 165. it was determined, that a conditional sale by one to his partner, of his moiety of the joint stock, was void, as against the creditors of the vendor; because the vendor, after the sale, was permitted to continue in appearance the partner of the vendee. The general doctrine of the necessity of changing possession is likewise clearly supported by Lord Mansfield, in *Worseley v. Demattos*, 1 *Burr.* 467. and is directly established in *Edwards v. Harben*, 2 *Term Rep.* 587. in which the defendant took from *A.* a bill of sale of certain goods, taking possession of some trifling article in the name of the whole, but agreeing to leave the goods in the actual possession of *A.* for fourteen days; within which period *A.* died. At the end of that time, the defendant took possession of the goods. This action was brought against him, as executor *de son tort*; and sustained, on the ground that *A.*'s continuing in possession was inconsistent with the deed, and fraudulent. On the same principle was the decision of *Bamford v. Baron*, 2 *Term Rep.* 594. *in notis*, and of *Paget v. Perchard*, 1 *Esph.* 205. These cases, indeed, except perhaps the last, arose upon the construction of the statutes of 13 *Eliz.* and 21 *Jac. I.* But the statutes of *Eliz.* have been considered declaratory of the common law. And in *Ryall v. Rolle*, *Burnet, J.* said, that such contracts were held to be fraudulent at common law; and Chief Baron *Parker*, that fraudulent deeds might be avoided at common law. Above all, we have the opinion of Lord Mansfield in *Cadogan v. Kennet*, *Cowp.* 434. that "*the principles and rules of the common law, as now universally known and*

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June, 1809. *understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4."* In the supreme court of the *United States*, the same principle has been adopted, and the authority of *Edwards v. Harben* recognised, in *Hamilton v. Russell*, 1 *Cranch*, 309. But it is said, in support of the rule, that the retaining of possession by the vendor is not, *per se*, fraud, but only evidence of fraud. Though the contrary doctrine was held in the case cited from *Cranch*; yet, if we admit this, it will not at all oppugn the general principle contended for; since every equivocal fact may be explained, to show its precise nature and tendency; although, in the cases now under consideration, the facts will be fixed by the *prima facie* evidence respecting them, unless particular circumstances are proved, in order to except them from the operation of the general rule. The position is not, however, true in the extent; for until this explanation is made, a sale without possession is holden to be fraudulent in point of law. [See 2 *Term Rep.* 596. See also 1 *Cranch*, 318.] These exceptions form a separate class of cases, wholly distinguishable from those before cited, and from that now before the court; and will serve to show to what extent the rule contended for is applicable.

With respect to the sale, or mortgage, of ships at sea, it has been held, (*Atkinson v. Maling*, 2 *Term Rep.* 462.) that the delivery of possession need not accompany the deed of sale; as this would be to require an act of which the performance would be impossible, but the grand bill of sale must be delivered; and this is sufficient, if the vendee take possession immediately on the ship's arrival at home. So of an assignment of goods at sea, the delivery of the bills of lading and endorsement over of the policies of insurance, was held sufficient; the vendor having, after this, no longer the order



and disposition of the goods. (*Brown v. Heathcote*, 1 Atk. 160.) But where the owner of certain vessels, used only in navigating the river *Thames*, mortgaged them, and after kept possession for three years, and borrowed money upon the credit of being owner, they were held liable to be sold under a commission of bankrupt against the mortgagor. (*Stephens v. Sole*, cited 1 Atk. 157.) The decisions of the cases of *Bucknal v. Roiston*, Pr. Ch. 285. *Cadogan v. Kennet*, Cowp. 432. *Haselinton v. Gill*, 3 Term Rep. 620. n. *Jarman v. Woolton*, 3 Term Rep. 618. *Kidd v. Rawlinson*, 2 Bos. & Pull. 59. *Hoffman v. Pitt*, 5 Esp. 22. and some others, were on the ground, that the vendor might retain possession, consistently with the deed, the trust appearing on the face of the deeds, and the transactions being evidently clear of fraud; and *Buller* (N. P. 258.) says, "but yet the donor continuing in possession is not, in all cases, a mark of fraud; as where the donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money;" and so was the case of *Maggott v. Mills*, 1 Ld. Raym. 286. and of *Kidd v. Rawlinson*, before cited. Here the parties were not, before the sale, in the situation of debtor and creditor. [See 2 Bos. & Pull. 60.] Having shown, as we imagine, the existence of the rule requiring that a transfer of possession should accompany the deed of sale of personal things, and that it is applicable to all contracts of sale, where, from the situation of the goods, an actual delivery is not impracticable, and where the retaining possession by the vendor is not fairly consistent with the deed, the contract having, clearly, no fraudulent operation, we proceed to inquire whether assignments of choses in action are not comprehended within the same rule; so far as it can be made to operate, at once, on things in possession, and things merely in action. And here it may be remarked, generally, that the terms *goods, chattels, effects*, comprehend

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*choses in action*; and it was so held in *Ford and Sheldon's* case, 12 Co. 1. and in *Ryall v. Rolle*. And in the statute respecting absconding debtors, it is declared "*that debts due to any such absent and absconding debtor shall be considered as his EFFECTS.*" (Stat. Conn. tit. 14. c. 3. s. 5.) The inference, therefore, must be, that a general rule respecting goods, chattels, effects, will, if restrained by no reason operative on the particular case, always extend to *choses in action*. Consequently, we observe, that, as in cases of the sale of goods, the vendee is not to permit the vendor to retain the control and disposition of the goods, so, by parity of reason, in assignments of *choses in action*, it is the duty of the assignee immediately to withdraw them from the control of the assignor; that is to say, this act, to conclude creditors, must accompany and follow the deed of assignment. This is to be done by delivery to the assignee of the specialty, or written evidence of the debt, if such there be, and *notice to the debtor*. On this point, it is certain, that fraud can be as easily practised, the public may be as thoroughly blinded, and creditors as effectually lulled to security, by a secret assignment of debts, as by a sale of goods without transfer of possession. From principle no argument can be drawn to justify an assignment of debts without delivery of the writings, and notice to the debtor, which will not directly invalidate the rule deduced from the authorities we have before cited. And it is in vain to rely on technical distinctions founded on the supposed difference in nature between *choses in action* and things personal in possession. For where prevention or suppression of fraud is the object, courts have disregarded such distinctions, and have exercised much liberality both in the construction of statutes, and in decisions at common law. We rely not alone, however, on abstract principle. On this point the plaintiff's case is abundantly supported by authority. And, first, we will recur again to the case of *Twyne*; in which the

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opinion of Lord Coke supports this, as well as the former part of our case. "*When ANY GIFT shall be to you in satisfaction of a debt, by one who is indebted to others also, let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud.*" Surely, there may be a "gift" of debts as well as of goods; and such "gift" may be as well made in private, or without notice; and would, if known, as effectually destroy the donor's credit, and alarm his creditors, as a transfer of his goods to secure a favourite creditor. The opinion of Chief Baron Parker, in *Ryall v. Rolle*, 1 Atk. 177. is also in point. "*If a bond is assigned, the bond must be delivered, and notice must be given to the debtor;* BUT IN ASSIGNMENTS OF BOOK DEBTS, NOTICE ALONE IS SUFFICIENT, *because there can be no delivery, and such acts are equal to a delivery of goods which are capable of delivery.*" So 1 Pow. on Mort. 28. where, after mentioning the necessity, on an assignment of a bond, of a delivery of the bond, he says—"Upon the same principle, debts mentioned in a schedule, though not capable of delivery, may likewise be assigned conditionally; but in such case, notice to the persons indebted seems to be indispensably necessary to protect the assignee," &c. The same principle is also found in the civil law. (*Domat*, vol. 1. b. 1. fol. 61.) "*Things incorporeal, such as an inheritance, a debt, or any other right, cannot properly be delivered, no more than touched; but the power of using them is in lieu of delivery. Thus the seller of a right of service does, as it were, deliver it, when he suffers the buyer to make use of it. Thus he who sells or transfers a debt, or any other right, gives to the buyer or assignee a kind of possession by the power which he gives them to exercise this right, IN CAUSING THE TRANSFER TO BE INTIMATED IN THE DEBTOR, who, after the said intimation cannot own any other master, or possessor of this right, but the assignee to whom it is transferred.*" While we are considering the general principles applicable to this case, it will be



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proper to take notice of a position advanced by the counsel who argue in support of the motion, that "to vindicate the charge of fraudulent intent, it is necessary to make out that want of notice is fraud *per se*." This position is incorrect both in an abstract and a practical point of view. There is no necessary affinity between *fraudulent intent* and *want of notice*. Men may, and often do, act with honest intentions, both in a moral and a legal sense, and yet act secretly; on the contrary, one may act openly with very mischievous designs. But the observation can have no practical application to the questions which have been raised in this case. For though want of notice be not *necessarily* and *of itself* a fraud, yet the policy of the law may declare certain transactions to be fraudulent—that is, that such transactions shall be treated in the same manner as if the intentions of the parties were actually fraudulent, unless they are made known in a certain, prescribed manner. And for this purpose, the law may announce to the parties entering into a contract, that unless this contract is notified to a particular person, within a specified time, it shall be held to be a fraudulent contract; provided it is not shown from the contract itself, that it can have no such effects as might have resulted, had it been made with views actually fraudulent. So far as this, want of notice is fraud *per se*; or if the term *prima facie evidence* is more acceptable, we will grant it to be such, only. Such evidence is conclusive, until it is contradicted.

The remaining question is—whether the case now under consideration can justly be excepted from the general rule respecting the sale of goods and assignments of *choses in action*. The circumstance that notice was actually given, though not till two days after the plaintiffs' attachment, seems not to be relied on. And indeed had these plaintiffs attached goods in *Duryee's* store, and Messrs. *Waddington, &c.* having a bill of sale,

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executed three months before, had contrived to get the goods out of the sheriff's hands, two days after the attachment, they might claim to hold them, by a transfer of possession, accompanying and following the deed of sale, with just as good grace, as they could now challenge this debt, by virtue of the notice. It is granted us, that *Perkins*, previous to his receiving notice, might safely have paid the debt to *Duryee*. It was, therefore, until that event, *Duryee's* debt; and, as such, it might be, and was, attached by *Tudor Woodbridge & Co.* But a subsequent act of the assignees could not affect the rights of the attaching creditors. It is, however, objected, 1. That notice to the debtor constituted no part of the assignment; 2. That the property of the debt is transferred by the assignment itself; 3. If notice is a part of the contract, the assignee could not hold, until notice had been given, though there had been no neglect to give notice; 4. No act of ownership was exercised by *Duryee*; 5. No false credit is obtained by taking an assignment of a book debt, without giving notice; and giving notice does not prevent any person from being imposed upon.

To these objections we answer, 1. That after the execution of the deed of assignment, the transaction remained inchoate, until consummated by notice. The 2d objection is overthrown by another argument of the gentleman, viz. "that the object of notice is merely to prevent payment to the assignor;" for if the contract itself transferred the property of the debt, after the contract, the property of the debt no longer remained in *Duryee*; and payment could no more be made to him than to a stranger, who had never owned the debt. 3. We are not inquiring what length of time shall be allowed the assignee to give notice. Until notice, the assignee must run his own risk. 4. It does not appear that acts of ownership were, or were not, exercised by

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*Duryee*. He could have exercised such acts by discharging or compounding the debt. 5. A fictitious show of credit can as easily be kept up by an assignment of a book debt, without notice, as by a sale of goods without transfer of possession; and this is a very strong case to prove it. *Tudor, Woodbridge & Co.* and *Perkins* resided in *Hartford*; *Duryee* in *New-York*; between them all there existed a constant intercourse of business. From the course of business *Tudor, Woodbridge & Co.* must have known, that *Duryee* had large sums due him in *Connecticut*; and they could not hesitate to trust him on the credit of these debts, especially as they were at all times liable to attachment. Suppose, then, that *Perkins* had been duly notified of this assignment. Can it be said, that *Tudor, Woodbridge & Co.* would not have discovered it? The knowledge of such an event would never have been confined to *Perkins*. *Duryee's* credit must have been instantly ruined; for no act could be more fatal to it than the assignment of his books to secure a creditor. After this, would *Tudor, Woodbridge & Co.* have trusted him? Or if they had already done it, would they have spared any exertion to obtain immediate security? It cannot, then, be said, that such an assignment gives no false credit to the assignor; or that it does not expose other persons to imposition.

We need only add, in the words of Lord *Hardwicke*, (1 *Atk.* 185.) "that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when perhaps they have not a shilling of property in them."

BY THE COURT. Where there is an assignment of a book debt, until notice of this assignment is given to the debtor, he remains the debtor of the assignor, and



of course cannot be the debtor of the assignee; June, 1809.  
 it being a rule of law, that where there is sale of  
 personal property, the possession of such property  
 must be changed from the vendor to the vendee,  
 or it will be liable to the creditors of the vendor. So  
 in the case of an assignment of a bond, or note of hand,  
 there must be a delivery of the bond or note to the  
 assignee, and notice of the assignment must be given  
 to the obligor, or promissor; for, until that is done, the  
 obligor or promissor remains a debtor to the obligee or  
 promisee. And although there can be no delivery of  
 a book debt to the assignee; yet all that can be done  
 ought to be done. Notice, therefore, is indispensable;  
 for until such notice is given, the assignor remains in  
 full possession of the book debt; and his debtor is in-  
 debted to him, until he has notice of the equitable  
 claim of the assignee. The court do not, therefore,  
 advise a new trial.

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New trial not to be granted.

JEHIEL HALE *against* ELISHA HALE.

WRIT of error.

This was an action of account, brought by *Elisha Hale*  
 against *Jehiel Hale*.

In an action of  
 account, alle-  
 ging, that the  
 plaintiff and  
 defendant  
 built a ship

under an agreement, that each should contribute an equal moiety of the ex-  
 pense, and receive an equal moiety of the avails; that she received a cargo, and  
 was sent to *Baltimore* by the plaintiff and defendant; thence, by direction of the  
 plaintiff and defendant, she went to *London* with a cargo on freight; and afterwards per-  
 formed several other voyages with a cargo on freight, and was, at last, sold at *Cadiz*, and  
 that the defendant received more than his proportion of the ship, both of the voyages  
 and the sale: Held, that the plaintiff and defendant were to be considered, under this  
 declaration, as joint owners of the ship, and jointly interested in all her voyages, from  
 the time she was built until she was sold; and that in order to adjust the accounts of  
 the parties, it was proper for the auditors to inquire into the earnings of the ship,  
 and the losses incidental to the voyages.

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The declaration stated, that in *September*, 1800, the plaintiff and defendant began to build a certain ship, called the *Columbia*, as partners, it having been agreed, by them, that each should pay or contribute an equal moiety of the expense of the ship, and that each should receive an equal moiety of the avails. She was finished in *November*, 1801; and the plaintiff paid more than his proportion of the expense, *viz.* two thousand dollars. In the course of the same month, after receiving a cargo on board, she was sent, by the plaintiff and defendant, on a voyage to *Baltimore*; from thence she sailed, in *February*, 1802, by direction of the plaintiff and defendant, on a voyage to *London*, with a cargo on freight, where she arrived in *April*, 1802; and afterwards performed other voyages, *viz.* one from *London* to *Genoa*, with a cargo on freight; and from thence to *Cadiz*; at which last place she was, in *August*, 1802, sold and disposed of; and the defendant received more than his proportion of the avails of the ship, both of the voyages and the sale, *viz.* three thousand dollars over and above the one moiety of the avails, to account, &c.

The defendant having suffered a default, there was a judgment *quod computet*; auditors were appointed; and an award was made, in the plaintiff's favour, for 2,149 dollars and 18 cents.

The defendant remonstrated against the acceptance of this award for the following reasons:

1. That the defendant was required to account as the plaintiff's bailiff, and partner, in building and selling the ship *Columbia*, and was charged to be indebted only as having received of the sales of the ship more than his proper proportion, and as having contributed towards the building of the ship less than his proper proportion; yet, before the auditors, the plaintiff offered to prove, by

his own oath, and other testimony, that the plaintiff and defendant were partners in navigating and freighting the ship in her several voyages. To the admission of this evidence the defendant objected; but the auditors admitted it.

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2. That the auditors allowed plaintiff 150*l.* lost by the plaintiff, by reason of his own default, in the purchase of a bill of exchange, drawn upon *John Broome*, in favour of the plaintiff; which bill was not received in payment of said ship, or for her freight and earnings.

3. That the auditors allowed the plaintiff 472*l.* 4*s.* for a quantity of dollars seized by the revenue officers at *Cadiz*, forfeited by the plaintiff's neglect in entering them for exportation, and with intent to defraud the government of *Spain* of its duties; though it was proved before the auditors, that the plaintiff knew the dollars would be liable to condemnation, if not entered.

4. That the auditors allowed the plaintiff 54*l.* 4*s.* 10*d.* for 41 dozen of shoe patterns, purchased by the plaintiff, on his own private account, at *Genoa*, which were seized at *Cadiz* as forfeited to the government of *Spain*, by reason of the plaintiff's personal misconduct; and that the auditors allowed the plaintiff 30*l.* money left at *Cadiz*, to defray the expenses of prosecuting his claim for the shoe patterns and the money.

To the allowance of these several claims the defendant objected before the auditors; but his objections were overruled.

To this remonstrance the plaintiff replied,

1. That as to the first exception, the allegations are not true.



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2. That as to the second, the plaintiff proved before the auditors, that said bill of exchange was purchased for a good bill, with money received for the sale of the ship, and for the joint interest and benefit of the plaintiff and defendant.

3. That as to the third, there was no proof that the dollars were seized by reason of any misconduct of the plaintiff in not entering them, or of any transaction of his at *Cadiz*; and that the residue of the exception was not true.

4. That as to the fourth, the shoe patterns were purchased for the joint benefit of the plaintiff and defendant, with money received for freight of articles on board said ship, in *Genoa* currency, which money was not current in any other country. The plaintiff then denied that it was proved before the auditors, that they were purchased on his private account, or that they were forfeited by any fraudulent conduct of his; and averred, that the *30l.* was left to prosecute the joint claim of the plaintiff and defendant; and that all he did was by virtue of full power to act in all respects for the joint concern of the plaintiff and defendant, which fact was proved before the auditors.

The court found, that the allegations in the first exception were true; but adjudged them insufficient. The second exception they adjudged insufficient. The third they found not true. The fourth they held to be sufficiently answered by the facts stated in the plaintiff's replication, which they found to be proved.

The award was thereupon accepted.

*Ingersoll* and *Daggett*, for the plaintiff in error, contended,

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1. That the first exception to the award was good; because the declaration did not charge the defendant in account for any arrears, except in the building of the ship, and the avails, that is, the proceeds on the sale. Before the defendant can be called upon to account for the earnings of the ship, it must appear, that as to those earnings he was the plaintiff's bailiff; and this for two reasons: first, that he may have the notice which he is entitled to, of what he has to defend against; and secondly, that the judgment in this case may hereafter be pleaded in another action. But this declaration does not allege that the voyages which the ship performed were undertaken for the joint benefit of the plaintiff and defendant, or that they were jointly interested in the freight.

[The counsel did not rely on the second exception.]

2. That the third exception ought to have prevailed; for though that part of it, which was denied, was found untrue, yet a part of it was admitted by the plaintiff in his answer thereto, and the fact so admitted clearly was not the subject of inquiry under this declaration.

3. That the loss on the shoe patterns was an adventure, in which there cannot be a pretence that the defendant was concerned. By the finding of the court, it appears, indeed, that the shoe patterns were purchased with money received for freight. But admitting that the plaintiff and defendant were jointly concerned in this freight, does it follow, that the plaintiff had, of course, a right to lay out the money for shoe patterns? Could the plaintiff, by his own act, make the defendant a partner with him in these purchases? Because *A.* and *B.* are partners in the building and sale of a ship, does that make them partners in every kind of traffic? Could

June, 1809. the defendant have claimed a share of the *profits* if there had been any?

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4. That the money paid to regain the dollars and shoe patterns must follow the fate of the articles; and, therefore, the auditors should not have made the defendant account for it.

*Brace and Diwght*, for the defendant in error, insisted, that the declaration covered the whole case. It is alleged, that each was to pay half the expenses of building the ship; and that each should *receive half the avails*. It is, however, contended, that the "*avails*" means the *proceeds of a sale*. But it is not used solely in that sense in this declaration; for the concluding averment is, that the defendant received the avails, *both of the voyages and of the ship*. The earnings of the ship, while navigating for their joint benefit, are as much avails as the proceeds of the sale. The auditors, then, did right in admitting the evidence.

Should it be conceded, that the voyages from *London* to *Genoa*, &c. were undertaken without the defendant's consent, or approbation; yet it is alleged, that he *received* more than his moiety of the freight as well as the sale, and his receiving the avails of those voyages ratifies the plaintiff's conduct, as fully as if it had been within the letter of a power of attorney. The same answer may be given to the purchase of the bill of exchange, and to the purchase of the shoe patterns, &c.

BY THE COURT. The demand is, that the defendant render his account for the time the parties were concerned, as copartners, or joint owners, of the ship. And it is conceded, that they were joint owners from the time she was built until she was sold at *Cadiz*; but it is contended, that there are not sufficient averments in



the declaration, of their being jointly concerned in all the voyages she made while they continued owners. June, 1809.

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It is averred, "that it was agreed, by and between the plaintiff and defendant, that each should pay and contribute an equal moiety of the expense of the ship, and receive an equal moiety of the avails thereof."

And again: "that the ship received a cargo in *November*, 1801, and was sent to *Baltimore* by the plaintiff and defendant; from thence, by the direction of the plaintiff and defendant, to *London*; and afterwards she performed several other voyages [specifying them] until she arrived at *Cadiz* in *Spain*, in the month of *August*, 1802, where she was sold; and the defendant received more than his proportion of the avails of said ship, both of the voyages, and of the sale thereof."

The plain and obvious meaning of these averments is, that they continued joint owners of the ship from the time she was built until sold in *Cadiz*, and under their direction; and that they were equally entitled to the avails of the ship and freight.

It was proper for the auditors to inquire into the transactions between the parties relative to the building of the ship, and all her voyages, until she was sold. The averments in the declaration embrace the whole of that time. And in order to adjust their accounts, it was necessary they should admit the proof objected to by the defendant.

If the voyages from *London* to *Italy*, and from thence to *Spain*, had been undertaken without the consent of the defendant; yet, as he received the avails thereof, it was an approbation of the plaintiff's conduct.

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The defendant had an opportunity, before the auditors, to show, by his own relation under oath, what sums he received for the vessel and the freight. This action is an appeal to the party before the auditors for a disclosure under oath by our statute.(a)

Judgment affirmed.

(a) Tit. 4.

WILLIAM C. BULL *against* JAMES BULL.

A power to two executors to sell & dispose of an estate, in such way and manner as they shall judge most beneficial to the devisees, will not give one of them a power to sell, nor will it authorize one or both to enter upon and occupy the estate.

MOTION for a new trial.

This was an action of ejectment.

The general issue was pleaded; and upon trial to the jury, the plaintiff, who was the son and heir of *William W. Bull*, deceased, claimed by virtue of a devise of *Caleb Bull*, deceased, to *William W. Bull*. The defendant was an executor of the will of *Caleb*, and claimed by virtue of another clause therein. The deviser, after giving the use of part of his estate to his wife, for her life, proceeds as follows: "*Item*, I give and bequeath unto my son *William W. Bull*, two thirds of all and every property, I may be possessed of, at the time of my decease, after my just debts are paid; and to my daughter *Mary Otis Bull*, the other third, in like manner. Lastly, I appoint my brothers *James Bull*, and *Thomas Bull*, executors of this, my last will, and testament, with full power, to sell, and dispose of any, and every part, of the estate belonging to me, in such way, and manner, as they may judge most beneficial for the legatees, except the house, &c. bequeathed to my wife

*Abigail, during her life, and at her decease, then the disposal of said house, &c. to be disposed of at the executors' discretion."*

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By the latter clause, the defendant claimed the right of possession, in the estate of *Caleb*, until the estate was settled. But the court directed the jury, that the plaintiff had the title, and the right of possession. And the jury accordingly found a verdict for the plaintiff.

A new trial was moved for, on account of this direction to the jury; and the question reserved for the opinion of the nine judges.

*Dwight*, in support of the motion.

The only question arises as to the nature of the powers given to the executors of *Caleb Bull*, by this will. In *England*, there has been a diversity of opinions, and nice distinctions, as to what is a mere power, and what a power coupled with an interest. *Pow. on Dev.* 302. *Co. Litt.* 113. note 2. *Pigot v. Garnish*, *Cro. Eliz.* 678. 734. *Howell v. Barns*, *Cro. Car.* 382. *Wall v. Thurbane*, 1 *Vern.* 355. 414. *Wareham v. Brown*, 2 *Vern.* 153. *Pow on Dev.* 290. *Liefe v. Saltingstone*, 1 *Mod* 189. 8 *Vin. Abr.* 235. *Tomlinson v. Dighton*, 1 *Salk.* 239. *Daniel v. Upley, Latch.* 9. 39. 134.

But it will not be contended, that this devise gives to the executors an *interest*, but merely an authority. And the inquiry is, as to the extent of that authority. This must depend upon the intent of the testator. He having provided for the payment of his debts, and for his wife, and apportioned his estate between his children, appoints his brothers executors, with full power to *sell*, and *dispose* of any, or every part of his estate, as *they may think most beneficial, for the legatees*. It is not an authority to sell



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**BULL.** to pay debts, nor to pay legacies charged upon the estate. His intent, then, must have been, to protect the property *from* the devisees, *for* the devisees; to guard it against those for whose use it was designed. As it respects the executors, it is as extensive as a power can be; it applies to every kind of property; it is confined to no time; and is bounded only by their discretion.

That the executors might *sell*, under this power, must be conceded. If they can sell all the estate, cannot they dispose of a part? Or, in other words, if they can sell, may they not lease? And if they may lease to others, may they not occupy themselves? But the testator, as if fearful that the word *sell* would not express all he meant, not only gives them the power to sell, but "*to dispose of it in any way,*" &c. He then must have intended to give them some other power than a power *to sell*, they being liable, however, to account for the avails. In short, having fixed *the proportions*, he authorizes his executors to distribute to the devisees, in such way, and manner, as they shall judge most beneficial. There is no limitation of this power; to effect the intent of the testator it must continue at least until the settlement of the administration account.

If such was the intent of the testator, it ought to be regarded. *Civil v. Rich*, 1 Ch. Cas. 309. He had a right to dispose of his own. He might have disinherited his children; and surely, he may subject them to the discretion of those in whom he confided. If the executors abuse this confidence, a court of chancery will interfere. *Thomas v. Thomas*, 2 Vern. 513. 2 Com. Dig. 699. But unless abused, they must retain all the authority given them by the testator.

*Ingersoll*, contra.

By the will of *Caleb Bull*, the estate vested in his

children. The executors have *no interest*, but merely an authority to sell. *Pow. on Dev.* 293. 300. *Foone v. Blount, Cowp.* 464. This is now admitted on the part of the defendant; but it is said, their authority is an authority not only to sell, but to dispose of the estate in any way they shall judge best. If this were admitted, it could have no effect in this case; because the executors have not exercised the power of selling, or disposing of it. They have neither sold, nor leased it; they have neither conveyed, nor contracted to convey it.

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It remains, then, a fee-simple estate in these devisees and their heirs. What then prevents them from gaining the possession of it? Not a particular interest in another; for it is agreed, the executors have no interest themselves, and have conveyed none. A power to *sell*, or *lease*, cannot give the right of possession against the owner. During the life of him who created an attorney with power to sell, such attorney never would claim that he could keep the owner out of possession. And it can make no difference, that this power is not to operate until the death of him who gives it. When the power has been exercised, a purchaser under it may have the right of possession; but the attorney has but a power, and that can give no more right to possession than to property.

The interest of the devisees might have been divested by the exercise of the power given to the executors; but until thus divested, the title is complete in them.

But if the executors had any rights, by virtue of this will, the rights do not exist at this time. They had a power, which they might have exercised; but it could not have been designed to continue for ever. If they sold, they must sell in a reasonable time, but could not sell at

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any future time. To make the delay in settling the administration account a ground for retaining the power, is to reward negligence, and give a premium for delay. The widow of *Caleb Bull* and one of the devisees are already dead; and if the power is yet to survive, there can be no limitation. And the executors (although it is expressly admitted that they have no interest) must have all the privileges of owners.

BY THE COURT. The will of *Caleb Bull* gave to *James Bull* and *Thomas Bull*, a joint power to sell and dispose of the estate of the testator, which was but a naked power, without being coupled with an interest. Even the power to sell could not be exercised by one of the executors, separately; and no power was given to them jointly, or separately, to enter upon, and possess, any part of the real estate; but the devisee having the fee, his heir at law has right to the possession.

New trial not to be granted.

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CHARLES SEYMOUR *against* WILLIAM C. BULL.

WRIT of error.

A power to executors to sell and dispose of lands devised to the children of the testator, is a power to sell only, and ceases upon the death of one of the devisees.

This was an action of ejectment, brought by *William C. Bull* against *Charles Seymour*.

The defendant, in his plea, disclosed the same facts as were relied upon by the defendant in the last case, and also, that *Abigail Bull*, the widow of *Caleb*, died in the year 1799; that the property claimed, was the house given to her, for her life; and that after her death, the exe-



cutors, judging it would be most beneficial to the legatees, leased the premises to the defendant. The superior court adjudged the plea to be insufficient.

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The case was submitted without argument, by *Dwight*, for the plaintiff in error, and *Ingersoll*, for the defendant.

**BY THE COURT.** The question arises on these pleadings, whether the executors had power, after the death of *Abigail Bull*, the widow of the testator, to lease the demanded premises by the will.

The executors claim this power, by the clause in the will, authorizing them "to *sell* and *dispose* of any and every part of the estate in such way, and manner, as they may think most beneficial for the legatees."

The words "*sell and dispose of*," are used in this will as synonymous terms; and this is a naked power to sell, not coupled with any interest. And until a sale should be made, the devisees had a right to the possession of the estate, (after the decease of the widow,) the fee being in them. This power is to be strictly pursued; and it gives no right to the executors to enter upon the land, or to lease it.

The plaintiff is heir at law to *William W. Bull*, the devisee in the will, who was dead at the time the action was commenced. The power of the executors to sell in such way, and manner, as they should think most beneficial to the legatees, was personal, and ceased at the time of the decease of the devisee under whom the plaintiff claims.

Judgment affirmed.

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HEZEKIAH HUNTINGTON against ELIJAH RUMNILL.

An attorney may be liable for a debt lost by his negligence, but he is not of course liable for the loss of the evidence of that debt. And in a suit brought against him for such loss, he may show, that the plaintiff had another remedy for the recovery of his debt, which he has successfully pursued.

WRIT of error.

*Elijah Rumnill* brought an action of account to the county court, in August, 1807, against *Hezekiah Huntington*, declaring that the defendant, being a practising attorney, in February, 1799, received of the plaintiff two notes to collect and account for; one against one *Leister*, payable to *George Merrills*, and endorsed by *George Todd*; the other, dated 30th March, 1787, for 8l. 10s. with interest, made payable by *Joseph Pease* to *David Todd*, and on the 23d January, 1799, endorsed by *David Todd* to the plaintiff; and that the defendant had neglected to account.

The record of such recovery will be proper evidence of this fact, although the attorney was no party to it.

The defendant admitting himself bailiff, and receiver, auditors were appointed, who awarded against the defendant for the *Pease* note. Upon a remonstrance, the court refused to accept their award; and appointed other auditors, who also awarded for the plaintiff, for the amount of the *Pease* note, and interest. This award was also set aside by the court, and new auditors appointed, who awarded for the defendant. *Rumnill* then brought a writ of error to the superior court, on the ground that the county court ought to have accepted the two former awards. The superior court reversed the decision of the county court, because they refused to accept the award of July, 1808, which was the second award. And to reverse that decision of the superior court this writ of error is brought.

From the facts proved before the court, upon a remonstrance to that report, it appeared, that the auditors found that *Rumnill* received this note of *George Todd* in part pay-

ment of a horse which he sold *George Todd*: that *Huntington*, in *March*, 1799, commenced a suit against the executors of *Pease*: that *David Todd*, the nominal plaintiff, interfered; compelled *Huntington*, by an order of court, to disappear; and submitted the suit to arbitrators: that *Huntington*, in *March*, 1800, at the request of *George Todd*, attorney to *David Todd*, without the direction of *Rumnill*, but relying upon the assurances of *George Todd* that he would settle with *Rumnill*, delivered *George Todd* the *Pease* note to exhibit before the arbitrators: that *Huntington*, however, first took a copy of the note and endorsement; and in *May*, 1800, at the request of *Rumnill*, commenced a suit against *David Todd* upon his endorsement, which suit failed for want of the original note.

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It also appeared before the court, that the defendant before the auditors offered to prove, that in 1801, at the request of *Rumnill*, he commenced a suit in favour of *Rumnill* against *George Todd* on the original contract of sale of the horse, on the ground that the *Pease* note was of no value, and recovered judgment before the superior court for 72 dollars and 42 cents damages, and 94 dollars and 14 cents costs, the court making the *Pease* note and interest the rule of damages: that *Rumnill* applied for, and received, this execution of *Huntington* against *George Todd*; and that *Todd* is able to pay it. A copy of the process and judgment and execution against *George Todd* was offered in evidence, and parol evidence of the other facts. The auditors refused to admit the evidence in support of these facts.

*N. Terry* and *Huntington*, for the plaintiff in error, contended, that the facts found by the auditors would not admit of a report against the defendant; and that they ought to have heard the proof offered.



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1. From the facts found, the award should have been in favour of the defendant.

It is agreed, *Huntington* was not liable for the *Merrille* note. The *Pease* note he put in suit immediately; and *Todd*, the plaintiff, interfered, and prevented the prosecution of the suit. When *Huntington* had done this, he had fulfilled the duty required by the bailment, and was no further liable.

But it is said, he delivered the note to *George Todd*, and is therefore liable. But a bailee is not to be made responsible unless he is guilty of misconduct, to the injury of the bailor. *Co. Litt.* 172. *Huntington*, by giving the note to a lawyer at the bar, cannot be considered as acting corruptly, or guilty of gross negligence. Besides, *Rumnill* received no injury by it, for his claim against *David Todd*, under the circumstances of this case, could not be defeated for want of the original endorsement.

But if *Huntington* were liable at all for delivering up this note, he could be liable only in a special action, in which the plaintiff must aver, as the ground of his claim, the loss of the evidence of his debt, and that he has sustained damage thereby.

2. But the evidence was relevant, and ought to have been admitted. The evidence offered went to show that *Rumnill*, having an election to pursue the endorser on his endorsement, or to treat the note, &c. as of no value, had elected the latter mode, and pursued it with success; and, consequently, had deprived himself of any other remedy. Indeed, the superior court, in the suit of *Rumnill* against *George Todd*, went upon the ground, that the sale of the horse by *Rumnill* to *Todd*, and the sale of the note by *Todd* to *Rumnill*, formed one transaction; and that *Rumnill* put the note in the hands of

*Huntington*, to procure payment for his horse; it was relevant, therefore, to show, that this object had been attained in another manner. And the moment judgment was rendered against *George Todd*, and the execution was satisfied, *Rumnill* would have been under an obligation to deliver over this note (if in his hands) to *George Todd*. And consequently, if *Rumnill* had the note in his hands, he could not now maintain an action against *David Todd* upon his endorsement. Nor do these facts militate against any facts stated in the declaration. That *George Todd* delivered to the plaintiff, in payment for a horse, a note endorsed by *David Todd*, surely does not negate the fact, that this note was endorsed by *David Todd* to the plaintiff.

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But it is said, these facts ought to have been pleaded. Three things only can be pleaded to an action of account; never bailiff and receiver; fully accounted; and a release. *Godfrey v. Saunders*, 3 Wils. 113. These facts could not then have been pleaded to the action. And we have no practice of pleading before auditors, as they have in *England*. Whatever is pleaded there before auditors, is given in evidence here. Our defence simply was, that the defendant had done his duty, and that *Rumnill*, his employer, approved of his proceedings. And yet this man; having, by the aid of the defendant, recovered of *George Todd*, the value of his horse, and the interest, would now recover of *Huntington* the amount of the note given for the horse, when the very ground of his recovery against *George Todd* was, that this note was of no value.

Again: The auditors ought to have admitted in evidence the record. The objection that it was between other parties is unfounded. A record is not conclusive evidence of the facts found in it, and cannot be pleaded in bar, except as against the same parties. But the

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*existence* of a judgment may be shown against those who were no parties to it, as in suits brought by sheriffs, &c. Here, the object was, not to establish the verity of the facts upon which the judgment was founded, but to show the existence of the judgment in support of a collateral fact. The auditors should have heard the evidence offered, *in mitigation of damages*, if for no other purpose; for surely, it was some mitigation of the defendant's offence in losing a note of 28 dollars. that he had recovered a judgment to the amount of 166 dollars, by the direction, and for the benefit of the plaintiff.

*Bradley*, for the defendant in error.

1. The defendant *Huntington*, having received this note for collection, was bound to procure the money from the maker or endorser, and pay it over to the plaintiff, or to show that it could not be collected, and that without any fault of his. The defence is, not that it could not have been collected, but that it cannot now be collected. because, indeed, the defendant himself has given up the evidence of debt confided to him, to the man of whom it was to have been collected, (or his son.) He is thus defending his *neglect* of duty, by showing an absolute misfeasance. He would justify himself for not collecting the money, by showing, that he himself put it out of his power. He would throw a loss upon us, by alleging a breach of duty in himself.

It is said, we cannot recover for this breach of duty in this action. But having shown the defendant's liability to account, it becomes his duty to account in a proper manner. From the facts, therefore, *found* by the auditors, there can be no doubt of the liability of the defendant for this note.

2. But it is contended, that the evidence was improperly rejected by the auditors.



This evidence could form no defence for *Huntington*; and consequently was irrelevant. It formed no justification; because if *Rumnill* had the note, he might yet recover of *David Todd* upon his endorsement. A recovery for this horse against *George Todd* could be no bar to a suit brought against *David Todd* upon his endorsement. And *George Todd* could maintain no suit against *Rumnill* for this note, or the money collected upon it; because he has parted with his interest in it, and the judgment in favour of *Rumnill* against him cannot re-vest the interest in him, especially as that judgment has never been satisfied. But if *George Todd*, in consequence of this judgment, could recover the note, or the money collected upon it, of *Rumnill*, then, it was more important that *Rumnill* should have the note in his hands to answer this demand.

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But the *defendant* cannot, upon any principle, refuse to perform his contract with the plaintiff, because it would be of no service to the plaintiff; and if *Rumnill* would be estopped from withholding this note from *George Todd*, *Huntington*, a mere stranger, cannot undertake to assert the rights or claims of *George Todd*. If the evidence would have barred the plaintiff's right of action, as is contended, it should have been pleaded in bar to the action before the court, and could not, at that late stage of the cause, be taken advantage of. 1 *Com. Dig.* 119. 120. 1 *Bac. Abr.* 37—39. 1 *Vin. Abr.* 157, 158. 163, 164.

Besides, this evidence could not be received, because it contradicts facts stated in the declaration: It goes to show, that the note was not in fact warranted to the plaintiff by *David Todd*, but by *George Todd*. Nor could the evidence be admitted to lessen the damages; for if *Huntington* had done his duty in the suit against *George Todd*, it could have no effect upon the damages

June, 1809. for not performing his duty with respect to the note endorsed by *David Todd*.

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Another objection applies to the copy of the judgment which was offered in evidence: It was not between the same parties. Had the judgment been against *Rumnill* in that suit, he could never have used it as evidence against *Huntington*; it cannot therefore be evidence for *Huntington*. *Peake's Ev.* 38. But it would be manifestly unjust, that this recovery against *George Todd*, which it is not pretended is equivalent to a recovery on the endorsement, should prevent a suit on the endorsement. Had the money been paid upon this judgment, a question might arise as to its effects; but that this judgment should bar an action, when in consequence of it the party is no nearer a satisfaction of his claim than before it was obtained, is extraordinary indeed. If *Rumnill* cannot recover of *Huntington* for this note, *George Todd* cannot; and thus *Huntington* makes himself, by his own act, the owner of the note, and has the right to dispose of it at his pleasure.

#### BY THE COURT.

An attorney, who receives a note, or other evidence of debt, for collection, is undoubtedly liable for the debt, if it be lost by his negligence. But the loss of the note, or other ordinary evidence of the debt, does not necessarily involve the loss of the debt itself. And in order to charge the attorney with the debt, the inquiry must be, not whether the ordinary evidence of the debt is lost by his negligence, but whether the debt itself is lost.

In this case, it appears, that the debt due to *Rumnill*, and put into the hands of *Huntington* for collection, was not only secured by the endorsement of *David Todd*,

but also, by the liability of *George Todd*, to pay the price of the article which had been sold to *Rumnill*, and for which the note had been assigned. Any evidence, therefore, which went to show, that the debt had been paid by *George Todd*, or remained secured by him, went to show, that the debt was not lost and was pertinent to the issue before the auditors. The judgment and execution obtained by *Rumnill* against *George Todd* was evidence of this description, and ought to have been admitted by the auditors. We are, therefore, of opinion, that the decision of the county court in rejecting the award of *July*, 1808, for the reasons stated in the remonstrance, was correct, and ought not to have been set aside by the superior court.

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ELLS-  
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Judgment reversed.

JAMES PHELPS and others against ABIGAIL ELLSWORTH  
and others.

WRIT of error.

This was a petition in chancery brought to the superior court, by the honourable *Oliver Ellsworth*, deceased, stating that *James Phelps* and *James Phelps, jun.* being indebted to him, in the sum of 2,569 dollars and 49 cents, gave their note, payable the 1st of *May*, 1805, on interest, and conveyed, by deed of that date, seven pieces of land, as collateral security; and on the 4th of *March*, 1803, they became further indebted, in the sum of 1,000 dollars, payable at the same time with the former; and as collateral security for the 1,000 dollars, executed a deed of four other pieces of land, together with the same lands contained in the first mortgage: That the equity

Upon a bill of foreclosure by a mortgagee holding separate mortgages for distinct debts, chancery will decree a foreclosure, upon the failure of the mortgagee, to pay both debts, and will not make separate decrees for each debt.



June, 1809. of redemption of *James Phelps, jun.* had been attached; and that of *James Phelps*, the elder, had been by him conveyed to others, who were made parties to the bill: that the money all remained due—praying for a foreclosure.

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None of the respondents, except *James Phelps*, (then called junior,) appeared. And upon inquiry, the court found the facts stated in the petition, to be true; and found due upon the *two mortgages*, 4,531 dollars, and decreed, that if the respondents failed to pay this sum within a limited time, they should be foreclosed of their equity of redemption.

The widow and children of the petitioner, and the administrators upon his estate, were made parties to the writ of error. All the plaintiffs in error, except *James Phelps*, were nonsuited.

The error assigned was, that all the lands contained in the last deed, was made subject to the payment of the debt, secured by the first.

*Ingersoll* and *Dwight*, for the plaintiffs in error.

These mortgages were made at different times, for different sums, and were entirely separate and distinct; and there should have been separate and distinct decrees relative to each of them, viz. that on the payment of 2,500 dollars, and interest, the mortgagee should release all the title he derived from the first conveyance; and on the payment of 1,000 dollars, he should release all the title he derived from the second deed. Had the mortgagor petitioned to redeem the lands comprised in the second mortgage, without the other, he ought to have been permitted to redeem them. There can be no more connection between two separate contracts, by the same

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person, than between two contracts by different persons. The lands are each charged with its own burdens; and the one ought not to be operated with the debts of the other. The object of a court of chancery, as to mortgages, is to place the mortgagor, after the law day, in the same situation he was in before. Before the law day, *James Phelps* might have paid the 1,000 dollars, and interest, and the last mortgaged lands would have been his own, unencumbered. Chancery will then permit him, upon the same terms, to effect the same thing. The most of the cases in the books, where the court compelled a redemption of both mortgages, are cases where the security was deficient; as in *Purefroy v. Purefroy*, 1 Vern. 28. But to sanction this decree, is to adopt the whole system of tacking debts to encumbrances on real estate; for there is the same equity for a mortgagee, that his bond or note should be paid, as that his other mortgages should be. But in this way, the law requiring deeds to be recorded would be of no effect; because, in cases of mortgages, the debt would not depend upon the original contract, but upon the state of accounts between the parties, when the application is made.

But however this may be, where the mortgagor petitions, the mortgagee cannot, upon his own application, enforce the redemption of both mortgages, or neither, and thus vary his own contract. *Pow. on Mort.* 511—517. He now asks, that the court will not permit the lands last mortgaged, to be free from the encumbrance upon the payment of principal and interest. This is asking the court to place him in a better situation than he placed himself; because he is not willing to take, what before the law day expired he might have been compelled to accept. But the language of the petition is, that he should have the principal and interest upon each contract.

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*Gould and R. M. Sherman*, for defendants in error.

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Natural justice requires that a mortgagor, whose estate is forfeited at law, should pay to the mortgagee all he owes him, before the latter should be compelled to give up the security he holds. And formerly chancery would not permit a redemption, until all moneys borrowed of the mortgagee, were paid. The rule now applies to cases only, where the loan is secured by mortgage. But as to mortgages, the rule has never been relaxed, and in justice should have retained its ancient force in all cases. Had the mortgagor made application to redeem, he must have redeemed both. *Margrave v. Le Hooke*, 2 Vern. 207. *Pope v. Onslow*, 2 Vern. 286. *Reason v. Sacheverell*, 1 Vern. 41. *Jones v. Smith*, 2 Ves. jun. 376. Although in some of these cases, it is said, that the mortgage or one of the mortgages is deficient in value, yet in none of them is it the principle of adjudication; in several of them, it is not even suggested. *Powell* indeed intimates, that the court is less liberal to the mortgagee, when the application comes from himself, but cites no authority in support of the remark, affecting this case. The case he states, is that of a mortgage and a bond debt; in such case, he says, if mortgagor petitions, he must pay the bond debt, as well as mortgage, but if mortgagee is plaintiff, *it seems* (he says) that he can enforce payment of the mortgage debt only. If any such rule or difference exists, it applies only to those cases where an *original equity* is sought, as where an obligee prays for more than the penalty of a bond; but not to cases like this, where the petitioner asks for no equity in *his favour*, but only that the mortgagor may exercise *his* equitable rights in a reasonable time. The fact that the first land was included in the second mortgage, shows, that the parties designed that the whole land should be security for each debt.



But if a decree were made upon the principles contended for, or this decree reversed, it could be of no possible benefit to the mortgagor; for if he should pay the money due on one mortgage, and the mortgagee should refuse to reconvey, unless both debts were paid, the mortgagor must then apply to a court of chancery to compel a conveyance. Upon that application, he, being plaintiff, must, according to the principles laid down from *Powell*, first satisfy both debts, before he could gain the legal title to either of the estates.

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This decree then, only effects directly, what then would be done circuitously.

#### BY THE COURT.

At law, both mortgages are forfeited; the mortgagee has a legal title to both. The only inquiry is, what is equitable between the parties. All agree, that the mortgagor, on his petition, cannot redeem one mortgage without the other. The reason assigned is, that as his relief is in equity only, he shall do equity to obtain it. The principle guiding such decisions is that it is *equitable* he should redeem both, or neither; and surely it cannot vary the principle, and ought not to alter the rule of equity, between the parties, that one, or the other, applies for it, unless the situation of the party seeking relief, requires an extraordinary interposition of the court.

This is the usual application, by the mortgagee, not seeking an original equity, but simply, that the court will limit the time, within which the mortgagor shall exercise his equitable rights. His equitable rights are, to redeem on paying all that is due upon both mortgages. This principle extends to all mortgages existing between the same parties, whether they embrace

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the same land in part, as in this case, or are wholly distinct, and independent. And were the court to adopt a different rule, and separate these mortgages, by their decree, and limit the time of redemption for each, the mortgagee might refuse the money, and compel the mortgagor to seek relief. The court would then decree that, which we think equity requires should now be decreed. We perceive nothing erroneous in the record.

Judgment affirmed.

DEBORAH M<sup>c</sup>CALL, HOBART M<sup>c</sup>CALL, GREEN M<sup>c</sup>CALL,  
 JOSIAH M<sup>c</sup>CALL, JABEZ M<sup>c</sup>CALL, LEVI COE and  
 DEBBY his wife, JOSEPH BABCOCK and MOLLY his  
 wife, and ELIPHALET MURDOCK and ANN his wife,  
 against ABIGAIL M<sup>c</sup>CALL.

If a person,  
 intending to  
 make a family  
 settlement of  
 his estate, in  
 nature of a  
 testamentary  
 disposition,  
 conveys lands  
 to his sons, by  
 several deeds,  
 and the deed  
 to one proves  
 defective,  
 chancery, af-  
 ter the death  
 of the grantor,  
 will compel  
 his heirs and  
 widow to per-  
 feet the title  
 of the grantee.

WRIT of error.

This was a petition in chancery, to the superior court, brought by *Abigail M<sup>c</sup>Call*, against *Deborah M<sup>c</sup>Call* and others.

The material facts stated, that were found by the court were: That *Archiphus M<sup>c</sup>Call*, on the 22d of September, 1784, designing to settle and estate his sons, *Hobart, Ozias, Green, Roger, and Walter*, did, by several deeds, duly signed, acknowledged, &c. convey farms of land to each of them, with covenants of seisin and warranty, and to *Jabez and Josiah*, the heirs of his son *Jacob*, deceased, he gave an equal share in money and securities. By the deed to *Roger*, he granted half the farm

on which he lived, and some other lands in *Goshen* parish; and by the deed to *Walter*, he granted a farm in *Exeter* parish, both in the town of *Lebanon*. These deeds to *Roger* and *Walter*, the grantor retained in his own hands, for further consideration; but delivered to *Hobart*, *Ozias* and *Green*, the deeds made for them, and to *Jabez* and *Josiah* the moneys and securities designed for them; and each of them has ever since possessed and enjoyed the same. Before any delivery of the deeds to *Roger*, and *Walter*, the father concluded to give the lands granted to *Walter*, to his son *Roger*, and the lands given his son *Roger*, to *Walter*; and to effect the same, caused the name of *Walter* to be erased from the deed conveying the *Exeter* farm, and the name of *Roger* to be substituted; and the name of *Roger* to be erased from the deed conveying the *Goshen* lands, and the name of *Walter* to be substituted, without the knowledge of *Walter*. He then delivered the deeds thus altered, and erased, without signing or acknowledging them again, to *Roger* and *Walter*, verily believing, and until his death continuing to believe, that he had thereby conveyed the *Exeter* farm to *Roger*, and the *Goshen* farm to *Walter*. *Roger*, under his deed, took and ever since has kept possession of the *Exeter* farm; and *Walter*, under his deed, took possession of the *Goshen* lands, and occupied them until his father *Archiphus* died, on the 30th of *November*, 1798, and continued in the occupation in the same manner until the 20th of *October*, 1802, when he himself died. Before his death, in *October*, 1792, *Walter* caused his deed to be duly recorded; and while in possession of the lands under his altered deed, he expended in repairs one hundred dollars. On the 12th of *June*, 1800, *Walter* having no real estate, except what was derived from the aforesaid conveyance, made his will, and devised all his estate real and personal, except a lot of ten acres, to the petitioner, his wife, and made her executrix, giving legacies to the amount of more than 1,000 dollars.

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On the 17th of *January*, 1787, *Archippus*, the father, made his will, which contained the following clause: "*Item*, I give to my son *Walter*, the one half of this lot I now live on, with the buildings thereunto belonging; the other half I have given him by deed heretofore." Which will was destroyed during the life of *Archippus*, who left estate to be distributed as intestate estate to the value of 3,650 dollars.

The deed so altered and delivered to *Walter*, has been, by the superior court, adjudged to be no evidence at law, of a title in *Walter*, to the lands supposed to have been conveyed thereby. And *Hobart M<sup>C</sup>Call*, *Ozias M<sup>C</sup>Call*, *Green M<sup>C</sup>Call*, *Roger M<sup>C</sup>Call*, *Ann*, the wife of *Eliphallet Murdock*, *Molly*, the wife of *Joseph Babcock*, *Debby*, the wife of *Levi Coe*, and *Jabez M<sup>C</sup>Call*, and *Josiah M<sup>C</sup>Call*, the sons of *Jacob*, deceased, are the heirs of *Archippus*; who also left a widow *Deborah*, who is still living. And the heirs, by release deeds of their right, have quieted *Roger* in the possession of the *Exeter* farm, conveyed to him by the altered deed, but refuse to quiet the devisee of *Walter*, in the possession of the *Goshen* lands, conveyed as aforesaid by the other erased deed.

From the decree it also appeared, that the court found that *Archippus*, before his death, gave to his daughters, respondents, portions of his estate.

And that the court admitted parol evidence to prove, that the deeds to *Roger* and *Walter* had been altered before delivery; and that the grantor verily believed, that he had thereby conveyed a title to the land described therein, although such evidence was objected to.

And the court decreed, that the respondents convey to the petitioner, the lands described in the deed to

*Walter*; and that she be discharged of all claims for June, 1809. rents thereof, &c.

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v.  
M'CALL.

The general errors were assigned.

*Goddard and Gould*, for the plaintiffs in error.

1. This decree could not be made against any of the respondents. Neither in law, nor chancery, can an instrument be rectified, because the parties were under a mistake in law. But however that might have been, in cases where there was a valuable consideration, yet here, there is no consideration, except that of love and affection. And where there is no other, chancery uniformly refuse to decree a specific execution. 1 *Pow. on Con.* 341. 2 *Pow. on Con.* 16. *Colman v. Sarrel*, 1 *Ves. jun.* 51. *Amb.* 406.

*Walter*, in his life, could have sustained no suit at law against his father, for damages, because the conveyance was voluntary, and chancery, *therefore*, would not have decreed a specific performance. And the case is surely not stronger against the children of *Archippus*. Besides, chancery requires stronger grounds, to make a decree, rendering an imperfect instrument valid, than to decree a specific performance. In the case of *Stapleton v. Stapleton*, 1 *Atk.* 10. there were a variety of considerations; Lord HARDWICKE lays no stress upon that of love and affection, but goes upon the ground of a valuable consideration.

In *Goring v. Nash*, 3 *Atk.* 186. the ground of the decree was, that it was a *marriage settlement*, which has always been holden to be, not merely a *good*, but a *valuable* consideration.

June, 1809. *Cory v. Cory*, 1 *Ves.* 19. was a petition, not for a specific execution, *but to set aside* an agreement; and the court refused to interfere, because it was a settlement of a family dispute. The facts, which have taken place subsequent to the deed, can have no operation. There is no analogy between the cases of a *parol* agreement for a *valuable consideration*, executed in part, and a *voluntary* agreement in writing. The cases under the statute of frauds, are all cases where there was a valuable consideration. Here, if *Walter* has made improvements, no injury will result to his heirs; for the contract being rescinded, an account must be taken, and they can retain the money expended in improvements.

And in the settlement of the estate, the advancements to the other sons will also be considered. Of still less importance is it, that the heirs have quieted *Roger* in his possession. It can in no way affect the petitioner; they may have compromised with him; but are not thereby bound to yield to the demands now made.

2. As the decree respects the daughters. There can be no equity in favour of the petitioner as against the daughters. If this is a family settlement, and if, as it respects the brothers, there was a valuable consideration, the daughters were not actually, or constructively, parties to it. They are, then, in equal equity with the devisees of *Walter*; and having the *legal* title, and equal equity, a court of chancery will not compel them to relinquish it, but suffer the law to have its course. 1 *Fonb.* 311, 312. *Mif.* 215. It would be hard, indeed, if having received nothing from the bounty of their father, they are now to be deprived of what the law would give them. The court, indeed, have found, that the daughters received portions; but this fact, if material, must appear upon the petition. The plaintiff must recover in chancery, as well as at law, *secundum allegata, et pre-*



*bata.* At law, a special verdict cannot supply defects in a declaration; a bad declaration is no more aided by a special verdict than by a demurrer. But if the fact be immaterial, the court having found it, will not render it material. It can, therefore, have no effect in the case.

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3. As it respects the dowress. It nowhere appears, that any provision has been made for the widow. She ought not, therefore, to have been compelled to convey. In *England*, the rights of a dowress are much regarded; she stands upon higher ground than a purchaser for a *valuable consideration*. She is entitled to a discovery from a purchaser of real estate from her husband, who had no knowledge of the marriage. 1 *Fonb.* 19, 20. 151, 152. Her equity is superior to that of heirs. 2 *Eq. Cas. Abr.* 383. A contract by her husband, for a valuable consideration, cannot be enforced against her. This contract could not be enforced against the creditors of *Archippus M'Call*. 3 *Atk.* 388. It cannot, therefore, be enforced against one whose rights are more carefully regarded.

Although a husband in this state may by deed deprive his wife of dower, it by no means follows that he can effect the same thing by an executory agreement, the enforcing of which depends upon the discretion of the court, regulated by circumstances. 2 *Pow. on Con.* 221.

It is said, that *Archippus* is a mere trustee. This is to assume, that chancery would enforce the contract against him. But were it so, there are now other parties, whose equity is as strong, and whose legal claims are preferable.

Again, our statute provides, that the wife shall have

June, 1809. dower in the estate of which the husband *died seised.*(a)  
 M'CALL. A court of equity cannot decree against the provisions of  
 v. a statute. *Webb v. Fitch et al.* 1 *Root*, 177. 1 *Fonb.* 17.  
 M'CALL. 21, 22. 4 *Vin. Abr.* 396. 2 *Eq. Cas. Abr.* 383. The hus-  
 band being seised of this estate, at the time of his death,  
 a court of chancery cannot say his widow shall not have  
 dower in it.

*Ingersoll*, for the defendant in error.

1. The facts proved lay a foundation for a decree against *some* of the respondents.

If, as is contended, the agreement on the part of *Archippus M'Call* was voluntary, it would not have been competent for him, in his life-time, after his son, in pursuance of it, had taken possession, and made improvements, to have refused to fulfil the agreement. A court of chancery would not permit him thus to ensnare his son, to induce him to expend his time, and money, upon the faith of a defective conveyance; but would have protected the son in the possession thus acquired. No case occurs directly in point; but it is analogous to the cases of part performance, under parol contracts to convey lands. Chancery, in such cases, will decree a conveyance, notwithstanding the statute of frauds; and one ground is the fraud of the party contracting to convey. He shall not be permitted to take the benefit of the labours of another, who trusts to his engagements.

And if this is to be considered a voluntary conveyance, it would be as *effectual, against all but creditors*, as a conveyance for a valuable consideration. But this is not a voluntary conveyance. It is a *family provision*;

(a) *Stat. Conn.* tit. 51. c. 1. s. 1.

the consideration is *blood*; and the father did no more than by the ties of natural justice he was bound to do. The sons, then, who have received estates from their father, in consequence of this family arrangement, are not in equal equity with the representatives of *Walter*. He was as much entitled to his farm, as they were to theirs. They were *all sons*, and each entitled in justice to the portion designed him. Unless, therefore, the other sons give up their estates, they never can claim in a court of equity that *Walter* shall give up his. By the deed to *Roger*, the heirs have recognised this family arrangement; and therefore ought not to be permitted to dispute it.

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## 2. As it respects the daughters.

It is found in the decree, that the daughters have received portions of the estate. It is said, this can have no effect, because it is not stated in the petition. But it is now too late to say this. It could have been taken advantage of only by objecting to the proof of that fact. As it has been proved, and found, it must be considered as well found.

But aside from this, the daughters, heirs of their father, can be in no better situation than he would have been in; and must convey, provided he would have been compelled to. Besides, this must be considered as a conveyance for a valuable consideration; a provision made for a family; "*estating*" his sons, in the language of our statute. Such conveyances are highly favoured in a court of chancery, and have been peculiarly protected. *Cory v. Cory*, 1 *Ves.* 19. *Goring v. Nash*, 3 *Atk.* 186. *Stapleton v. Stapleton*, 1 *Atk.* 2—8.

## 3. As it respects the dowress.

Had this deed been, what the parties meant, and sup-



June, 1809. posed, it was, effectual to convey this estate to *Walter*,  
 M'CALL the widow could have had no claim. Then as chancery  
 v. considers what is agreed to be done as actually done,  
 M'CALL. from the time of the agreement, she can be considered  
 in chancery, as having no right from the date of the defective instrument. The estate was, then, equitably, *Walter's*; and the husband cannot here be considered as having died *seised*. The land, therefore, did not descend to his heirs; and for the same reason, his widow has no right to dower. That the rights of a dowress are to be regarded is not denied; but the question now is, what are her rights.

That a court of equity will not relieve against the express provision of a statute is not contended; but the inquiry here is, does the statute apply to cases of mere trusts? This was not an executory agreement by *Archippus M'Call*; but an agreement executed, though imperfectly executed. He had no more *equitable* title, than if the conveyance had been perfect. And she who claims only by virtue of his title, can have no equity, which he did not possess.

BY THE COURT. The deed from *Archippus M'Call*, accompanied with the actual delivery of possession, under the circumstances, and in the manner, in which that deed was made, and delivered, cannot be considered, as an executory contract; but may be considered as a voluntary, though defective conveyance, which passed the whole equitable interest at the time, out of *Archippus*, and vested it in *Walter M'Call*; and though voluntary, being made with a view to a family settlement, and in the nature of a testamentary disposition of the estate, it is such a conveyance, as a court of chancery may validate, and when validated, and the defect in the conveyance cured, it will have relation to the time of the

delivery of the deed, and not only bar the widow of her right of dower, but destroy all claims of the heirs of *Archipfus* to the estate in question.

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Judgment affirmed.

THADDEUS STERLING against AARON ADAMS and HANNAH, his wife.

WRIT of error.

This was an action brought by *Sterling*, against *Adams* and his wife, on the statute for preventing and punishing vexatious lawsuits.(a)

If in an action of slander, the defendant admits the speaking of the words, but justifies on the ground that they were true, he does not thereby admit probable cause, so as to preclude him from showing the want of it in an action for a vexatious suit.

The declaration alleged, that said *Hannah*, whilst sole, and before her intermarriage with said *Aaron*, to wit, on the 23d of *July*, 1801, wittingly and willingly, with

A person may be liable for prosecuting, after he is of full age, a suit commenced by him maliciously, and without probable cause, while an infant.

In an action for a vexatious suit, the plaintiff having stated, that in the original suit, he recovered his costs, alleged, that he was most unjustly imprisoned on said suit, for the space of twenty four hours, and in defending the same expended large sums of money, to wit, the sum of 200 dollars in employing counsel to defend; also the sum of 200 dollars in paying witnesses, and maintaining them when attending on the trial; also the sum of 100 dollars in making various journeys to procure testimony, and in attending on the trial; without showing that such damages exceeded the costs recovered: Held, this was a sufficient allegation of damages.

An allegation that words charged as slanderous were known to the party and to the public in general, to be true, is a sufficient allegation of their truth.

(a) *Stat. Conn. tit. 167.*

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intent most unjustly to vex, and injure the plaintiff, and without any just or legal foundation, instituted and prosecuted, by the name of *Hannah Morehouse*, against the plaintiff, a certain action on the case, for slander. The process was by attachment. The plaintiff was described as a minor under the age of twenty-one years, suing by the advice and with the consent of her father and natural guardian. The words charged as slanderous were, in substance, that the plaintiff had the venereal disease, and had given it to the defendant's son. This action was returned to the *Fairfield county court*, held on the third *Tuesday* in *November* following. The general issue was pleaded, and the cause continued to an adjourned term, held on the last *Tuesday* of *February*, 1802, when the plaintiff appealed the cause to the *superior court*. It was continued from term to term in that court, until *January*, 1804, when the parties joined issue on the plea of *not guilty*, and went to trial to the jury. After witnesses had been sworn, and had testified, on both sides, the plaintiff suffered a nonsuit. Whereupon the *superior court* rendered judgment in favour of the defendant to recover his costs. The declaration in this case then averred, "That said action, in favour of said *Hannah*, was commenced by the wicked instigation of her, the said *Hannah*, who arrived at the age of twenty-one years on or about the 1st day of *November*, 1801, and before the said writ in favour of the said *Hannah* was returned to said *November county court* in the year 1801; and said *Hannah*, after she arrived at the age of twenty-one years, and before her intermarriage with said *Aaron Adams*, carried on and prosecuted said action in favour of said *Hannah*, so far as the same was carried on as aforesaid, against the present plaintiff, without any just, or reasonable, or probable foundation, and with intent and design most unjustly to vex, trouble and abuse the plaintiff in the premises; for that the said *Hannah* well knew, at the time of commencing said suit, and at the



time she carried on the same as aforesaid, that if the then defendant had spoken the words as alleged in her declaration, they were true; and said charges imputed thereby were long before known to her, and to the public in general, to be true." The declaration further alleged, "That the plaintiff was most unjustly imprisoned on said suit for the space of twenty-four hours; and, in defending the same, expended large sums of money, to wit, the sum of two hundred dollars in employing counsel to defend; also the sum of two hundred dollars in paying witnesses, and maintaining them when attending on the trial; also the sum of one hundred dollars in making various journeys to procure testimony, and in attending on the trial, to the damage of the plaintiff," &c.

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To this declaration there was a demurrer.

The *superior court* adjudged the declaration insufficient.

The plaintiff brought a writ of error to this court, at the term in *June*, 1808; when the cause was argued by *Gould*, for the plaintiff, and by *Duggett* and *Hatch*, for the defendants. The court being divided in opinion, continued it to advise, and ordered a further argument at this term.

*Sherwood* and *Hatch*, in support of the judgment below.

The action in this case, is founded upon the statute for preventing and punishing vexatious lawsuits.<sup>(a)</sup> But that statute creates or defines no new injury. Of course, the questions which arise upon this record are to be determined upon common law principles.

(a) *Stat. Conn.* tit. 167.

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To constitute a civil suit vexatious, in a legal sense, three requisites are indispensable, *viz.* malice, want of probable cause, and damages either actually fallen, or else inevitable. *Esp. Dig.* 527. 529. 6 *Mod.* 25. The inquiry now is, whether the plaintiff shows the suit, of which he complains, to have been thus vexatious.

1. For the defendants, it is contended, that the declaration contains no sufficient allegation of damages.

In the first place, no precise and certain rule is given, by which damages are to be assessed. The declaration admits, that costs were recovered in the original suit; but does not show, to what sum they amounted. A claim is now made for the extra costs in that suit; it ought, therefore, to appear, that the actual costs exceeded the taxed costs, and by how much; otherwise, it will be intended, that the taxed bill was a full satisfaction; or, at any rate, as the one bears no stated proportion to the other, it cannot be ascertained how great a part remains unsatisfied.

To the claim on account of the imprisonment alleged, a distinct answer will be given.

In the second place, no damages whatever are set forth, for which, under the circumstances of this case, a recovery can be had. The plaintiff avers, first, that he has been damnified, by imprisonment, and, secondly, that he has suffered expense.

As to the imprisonment: This being an action against husband and wife, for a vexatious suit instituted and prosecuted by the wife, *dum sola*; the present inquiry must be, whether she was liable at the time of the intermarriage. From the plaintiff's own showing, it appears that, at the commencement of the original suit, the wife

was a minor; the suit was commenced by guardian; the writ bore date the 23d of *July*, 1801, and the plaintiff was arrested on the same day. It further appears, that the wife came of full age on or about the first of *November*, 1801; so that the arrest and imprisonment took place during her infancy. Upon these facts, the general question arises, whether an infant is liable to an action for a vexatious civil suit? For, if not liable generally, in this action, it cannot be claimed, that the wife could have been subjected, for any vexation or damage sustained, prior to her completing full age.

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Here we are told, that an infant may be liable in this action; because, as it is said, he has it in his power to commit the injury. This is denied. We are not now considering the case of an action for false imprisonment; for which an infant is unquestionably liable, as for all torts, which are *vi et armis*. But an infant is not capable of commencing, or prosecuting a suit. If plaintiff, he must appear by guardian or *prochein amy*; if defendant, by guardian; but, in no case, can he appear by attorney; for the appearance of an infant's attorney is held to be without warrant. In *England*, the guardian, by whom he appears, is assigned either by the court, or by writ out of chancery. Both here and in *England*, the guardian has his warrant from the court, and not from the infant. 3 *Bac. Abr.* 148, 149. and authorities there cited.

An infant being thus incapable of prosecuting a suit, is it not a contradiction, in terms, to say, that he may prosecute vexatiously? Besides, the guardian, as we have seen, acts independently of the infant, deriving his powers from the appointment of the court. Can the infant be subjected for acts done in pursuance of such appointment, or for an abuse of the powers which it confers? The infant could neither cause, nor prevent, nor in any respect control the prosecution. How then



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can malice be imputed to him? Indeed, he is not *sui juris*; the law presumes him wanting in discretion. Shall he, then, be holden to judge of probable cause? No precedent of an infant's liability in this action can be found. Indeed, it does not appear, that it was ever attempted to subject an infant for this injury.

As to the expense: A claim is here made to recover for those items of expense, which, by law, are taxable in a bill of cost in favour of the prevailing party.

In an action for a malicious criminal prosecution, expense alone is a sufficient ground of damage; and the reason undoubtedly is, that no costs are recovered by the party prosecuted. *Esq. Dig.* 528. Not so, however, in an action for a vexatious civil suit.

In such case, if the action be instituted before a court of competent jurisdiction, be prosecuted in the ordinary manner, and be not attended by a malicious arrest and holding to bail, there is not any ground of damage which the law recognises. At any rate, it is claimed, that those items of expense which are ordinarily taxed in bills of cost, cannot be gone for, though the actual cost do in fact surmount the taxed cost. The forms of declaring, in this action, seem fully to warrant this conclusion. It is necessary that damages be specially alleged. *Savil v. Roberts*, 1 *Ld. Raym.* 379, 380. *S. C.* 1 *Salk.* 13. Why is this required? Expenses are always incurred in defending a civil suit; and, so far from being a special, they are an ordinary grievance. Indeed, why is it not actionable simply to bring a groundless and malicious civil suit? It is because the party prosecuting is amerceable *pro falso clamore*, and is liable to cost. The judgment ascertains and remunerates the claim of the defendant. Thus, the forms of the law in this, as in other cases, serve to show what the law is.

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Again, no case can be found, in which a recovery has been had, for those items of expense which are the subjects of allowance in bills of cost. All the instances, in which it is laid down by *Espinasse*, and other elementary writers, that this action lies, are cases, in which either no costs could be taxed; or where no costs could be taxed against the party guilty of the vexation or where the ground of damage was some grievance, which is not the subject of allowance in the taxation of costs. *Esp. Dig.* 525, 526, 527. *Dub.* edit.

First, where no costs could have been taxed. This happens in all cases, where, as in *Atwood v. Monger, Style*, 378. it is apparent from the record, that the court has not cognisance of the cause; or where, though the court have cognisance of the subject matter, its jurisdiction extends not to allow costs, as in *Hocking v. Matthews*, 1 *Vent.* 86. which was an action for suing the plaintiff in the spiritual court; or where the vexation is done under colour of final process, as in *Waterer v. Freeman, Hob.* 260. 266. where the defendant had sued a second *fi. fa.* and sold the plaintiff's goods, though he had before taken goods under a former *fi. fa.*

Secondly, where no costs could have been taxed against the party guilty of the vexation. Such was the case of *Thurston v. Eunnes, March*, 47. where a stranger, without the privity of the person to whom a sum of money was due, sued out a writ, and arrested the debtor for it.

Thirdly, where the damages are of such a nature as could not have been the subject of allowance in the bill of cost. This is the case in all actions for maliciously holding to bail. Under one or other of these heads, it is believed, may be classed all the cases of

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Further, the elementary writers all agree in assigning as the reason, why it is not generally actionable to bring an unfounded suit, that costs are recoverable. *Esp. Dig.* 525. *Gilb. L. Ev.* 621. 624. In this, many judges of the highest reputation have concurred, and expressly made it the foundation of their judgments, as may be seen on a reference to the cases already cited. The instances in which this action lies, are treated as mere exceptions to the rule; because, in those instances, the reason of the rule ceases.

Indeed, in one case, that of *Rogers v. Illscombe*, [MS. cited *Esp. Dig.* 535, 536.] this point seems to have been directly decided in our favour. An action was there brought for a malicious holding to bail. The plaintiff offered, as evidence of part of her damages, the costs she had been put to, in defending the former action; to which it was objected, that those costs had been taxed upon that action. On the other hand, it was urged, that as the extra costs always exceeded the taxed costs, they might go for these; but Justice *Buller* refused to receive the evidence. There was, indeed, another distinct ground of objection; but we are informed, that "the judge rejected the evidence apparently on both grounds."

2. The plaintiff's declaration shows, that there was a probable cause for the original suit. It admits the slanderous words to have been spoken, but alleges them to have been true; and it avers, that the first action was groundless only for the reason, that the defendant in that action, had a justification.

What shall be considered as probable cause, though a question of law, seems not to be very precisely defined.



Our inquiries on this point must be principally aided by detached cases and general rules.

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In the ancient proceedings in conspiracy, it is said, reasonable suspicion was probable cause. *Per Cur.* in *Sutton v. Johnstone*, 1 *Term Rep.* 507.

In one case [6 *Mod.* 25.] it is laid down, that the prosecution must be "without any colour of cause," to lay the foundation of an action.

In *Reynolds v. Kennedy*, 1 *Wils.* 232. it was held, that an erroneous sentence of condemnation by the sub-commissioners of excise, which sentence was alleged to have been "most justly reversed" by the commissioners of appeal, nevertheless showed a foundation for the defendant's prosecution.

In *Smith v. McDonald*, 3 *Esp. Rep.* 7. the defendant in the original prosecution was acquitted, without calling a witness. He thereupon brought his action against the prosecutor; in which, however, Lord *Kenyon* directed a nonsuit, remarking, "that if the evidence offered to the jury, at the trial of the indictment, was sufficient to cause them to pause, he should hold it a probable cause." From these and other authorities, it is to be collected, that a very slight matter amounts to probable cause, and that courts hold a severe hand upon this sort of actions.

Whether in slander, if the speaking of the words be admitted, and the defendant justify on the ground that they were true, the action shall be held to be without probable foundation, is now the question.

It is readily conceded, that this point has never arisen, or been determined upon this precise state of facts; but

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in analogous cases, in cases decisive of the principal one, it is believed to be well settled. From all the adjudications on the subject, this rule or principle seems plainly deducible, that where the defence in the first suit or prosecution is merely some collateral matter set up by way of avoidance, it implies or admits probable cause.

In the case of *Waterhouse v. Bawde*, Cro. Jac. 133. it was fully recognised, or rather laid down almost in *totidem verbis*. The court there held, that it was not actionable to sue in the spiritual court for any matter, which was properly demandable there, though the plaintiff had no cause of action; but if it appear on the face of the libel, that such matter was not properly suable there, and that the court hath no jurisdiction, then "action on the case lieth." "But," the court say, "if the suit be there for a thing demandable and recoverable there, by any thing, which appears by the libel; and by the defendant's plea, or by any collateral matter, he is barrable there, no action on the case lieth."

The determination in the case of *Fish v. Scott* is still more directly applicable to the point in debate. There the first prosecution was for an assault and battery. and the defence, that the assault was committed by the defendant *se defendendo*. For this prosecution action was brought, and came on to be tried before Lord Kenyon at *Nisi Prius*. But, upon the bare statement of the case, his lordship interposed and directed a nonsuit, upon this ground, as well as another, that self-defence being mere matter of justification, admitted the assault, and of course probable cause. This decision must have been acquiesced in; for it does not appear ever to have been brought up for revision at *Westminster-Hall*. *Peake's N. P. Cas.* 135.

The same doctrine was settled in the case of *Sutton*

*v. Johnstone*, 1 *Term Rep.* 493. 784. a case which was decided after repeated argument, and upon the fullest consideration. It should be added, that although there were opposite decisions had in this case before the two different courts, where it was tried in the first instances; yet, upon the point on which it finally turned, there was no diversity of opinion among the judges. The case was as follows: An action was brought for a malicious prosecution before a court-martial, for an alleged disobedience of orders. The declaration set forth the proceedings and sentence of the court-martial; from which it appeared, that the court found the fact of *disobedience*, but also found, that the disobedience was justified. The defendant in the original prosecution was acquitted therefore solely upon the ground of his justification; and thereupon the question arose in this action, whether, as the justification was the sole ground of acquittal, the declaration did not admit a probable cause? The court, upon a writ of error in the *exchequer chamber*, held that it did, and therefore adjudged the declaration insufficient. This judgment was afterwards confirmed in the *house of lords*.

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An attempt is here made to distinguish this case from the one at bar. In *Sutton v. Johnstone* it is said, that the prosecutor could not have been taken to know the facts which constituted the justification, and this is inferred from certain loose expressions, which fell from the bench.

To this it may be answered, that the science of the defendant as to these facts was expressly charged in every one of the four counts in the declaration. [1 *Term Rep.* 494, 495. 500, 501.]

But further, those averments, however necessary or proper, had not, and could not have had, any possible



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connection with the question upon which, that case turned. The question was, does this declaration show a want of probable cause? Science is properly averred in such a case only to show malice; but it was in that very case, that Lord *Mansfield* and Lord *Loughborough* remarked, that "from the most express malice, the want of probable cause cannot be implied." [1 *Term Rep.* 545.] Had the averment of malice been omitted, such omission would, indeed, have furnished a distinct topic of objection to the declaration; but, whether made or omitted, the question as to probable cause would still present itself in the same shape. The very conclusion, therefore, against which their lordships seemed most solicitous to guard, is now attempted to be supported by their authority.

It should here be observed, that, in each of the two cases last cited, the plaintiff had far more colour of claim, and the application of the rule, by which they were decided, was more apparently technical and arbitrary than in the present. In *Fish v. Scott*, the battery was supposed to have been committed in self-defence; in *Sutton v. Johnstone*, the disobedience was justified by a physical necessity. In neither case, was there in fact any criminality; though in each it was held there was probable cause of prosecution. No reference is here had to the second point, on which the judge expressed his opinion in the case of *Fish v. Scott*. There was said, indeed, in that case to be two distinct assaults; one of which only was committed in self-defence; but the judge expresses a clear opinion, that each constituted a probable cause. In the case before the court, the defence in the original suit was such as admitted guilt as well in the eye of the law, as of morality; for to utter slanderous words, with no other excuse or justification than that they can be proved to be true was never reckoned innocent. The law allows such a justification to avail as a

defence, "in compassion," as it is truly said, "to men's infirmities." [4 *Bac. Abr.* 480.] But never was it foreseen, that these *infirmities* would be alleged as meritorious, or made the foundation of a claim.

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The rule, here insisted on, is further supported by the authority of Chief Justice *Parker*. In *Jones v. Givins*, his lordship advances it, as an undoubted proposition, that "the determination" (*i. e.* the determination of the original prosecution) "must be such as does not admit a reasonable cause for the prosecution; as if a pardon be pleaded, which admits in some sort guilt, however is quitting the vindication of innocence, or justification, which admits the fact, and consequently reasonable cause of complaint." *Gilb. Cases in Law and Equity*, 215. The defence in the suit now claimed to have been vexatious, falls within both the exceptions here stated. In the first place, it "admits in some sort guilt;" and in the second, it is a mere matter of "justification, which admits the fact, and consequently reasonable cause of complaint."

But it is said here, that the justification in this case is substantially a denial of the cause of action, and no more admits a probable cause than the general issue; for that, to constitute slander, the words spoken must be false.

It is not easy to conceive how this justification differs from any other; every sufficient plea of matter of justification *ex vi termini*, effectually denies or repels the liability of the defendant. This proposition, therefore, applied as it is in the argument, levels, at one blow, all the authorities cited for the defendant; authorities, which have never once been denied or doubted in the books. In *Sutton v. Johnstone*, the justification established, that the disobedience was not wilful, and therefore not criminal. In prosecutions for assaults, committed in self-defence,

June, 1809. as in *Fish v. Scott*; or under authority, as in the common cases of sheriffs and their officers; the justification, in the same sense, denies the cause of prosecution. So, too, a plea of pardon effectually destroys any just liability to prosecution, or punishment. But is this court now prepared to overrule the well settled doctrine in all these cases?

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It is not surely intended, by this objection, to say, that the truth of words charged could, by the common law, be given in evidence under the general issue; or that a special plea, setting up a justification on that ground, would amount to the general issue. The rule on this point is too familiar to be repeated. (*Esq. Dig.* 517.)

Again, it is said, that it would have been competent, under this declaration, to have proved, by the confessions of the plaintiff, in the action of slander, that her suit was instituted and prosecuted, for the sole purpose, and with the single intent to vex. This is admitted; but what follows? Simply, that the action was prosecuted with malice; not that it was without probable cause. Similar confessions might be proved in very many cases, where the cause of action is undisputed. That such proof would have been admissible, therefore, goes merely to show, that malice is sufficiently stated; but the objection to this declaration is not for the want of an averment of malice.

3. But we contend further, that even the justification in the action of slander is not sufficiently set forth in this declaration. For aught that appears, the plaintiff in that action might have prevailed, had he gone to trial, on the issue closed. The words charged are admitted to have been spoken; and it is not alleged, in any traversable form, that those words could have been proved to be true, or that they were true in fact. It is merely



averred, that the several charges were known, by the plaintiff in that action, "and to the public in general, to be true, and that they imported no defamation," &c. From this, it cannot be inferred, that there was one competent witness, who possessed a knowledge of the truth of those charges; much less, that the then defendant could have availed himself of the testimony of such witness on the trial of that action. In whatever light such an allegation might be viewed, after verdict, it is believed to be ill on demurrer.

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It should here be remarked, that actions of this sort are not favoured. To bring a civil suit is "a claim of right," and there would be much danger in restricting it within too narrow limits. Cases of extreme hardship may undoubtedly be imagined; oppression, under colour of law, may, in some instances, be practised with impunity. Where there is even an undoubted right of action, it may sometimes be made to serve the purposes of vexation. But courts, in settling the limits of this action, have been obliged to balance between opposite evils; between the evils resulting from a too loose and a too restricted definition of the injury which it is intended to redress. It is not now the subject of inquiry, whether the rules already established are the most perfect that can be devised or imagined; but if that inquiry could properly be instituted here, it would not be difficult to prove, that they are founded in the highest wisdom.

*Gould and R. M. Sherman, contra.*

It is admitted, that a person must be guilty of a very gross abuse of the right of suing, before he will be liable for vexation. To the exercise of that right great indulgence is given. If the object of the plaintiff be, in any degree, to obtain right, his temper is not to be regarded. *When all the facts known or believed by the*

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As to the former it is contended by the defendants, that, if legal damage be alleged at all, the averments do not show the precise amount; and, therefore, that it does not appear, but the whole was satisfied by the bill of cost. But the items of taxable cost are ascertained by public law, of which the court can take notice without averment. For example: The most which can be taxed for counsel or attorneys is 1 dollar and 34 cents, in the county court, and 2 dollars and 68 cents, in the superior court. But here the plaintiff alleges, that he has expended 200 dollars in employing counsel to defend. Is not the *legal* inference from this averment, that the plaintiff had no remuneration, in the taxable costs, for what this sum exceeds the amount prescribed by statute? The defendants admit that the allegation of imprisonment is not answered by the objection; but contend, that it happened during the infancy of the plaintiff in that action. It is hardly claimed, that she wanted legal discretion to commit the injury. At the age of seventeen years, an infant is chargeable for malicious words,<sup>(a)</sup> and, indeed,

(a) 3 Com. Dig. *Enfant*, D. 4.

“ at the age of fourteen the law presumes the human mind has acquired a complete sense of right and wrong.”(a) She was more than twenty. But the principal argument is, that she had not the *control* of the action. It was, however, “ commenced by her wicked instigation.” If a person causes me to be prosecuted *criminaliter*, maliciously and without probable cause, it is not denied that he is liable in damages, although he could not commence or control the prosecution. If I destroy by an agent over whom I have not *legal* authority, am I therefore not responsible?

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As to the *expense*, it is further insisted, that we claim a recovery for taxable cost. This objection has already been obviated. It is clear we cannot recover a double satisfaction. But does it follow, that we cannot recover for expense at all? In the case of *Savil v. Roberts*, the plaintiff declared, that “ the defendant caused the plaintiff to be maliciously indicted of a riot, of which he was acquitted, by which he was put to *great expense*,” &c. without specifying the damage *particularly*; which was holden good in that case, but that it would not be good in an action for a vexatious *civil* suit; because, as appears by the whole case, in the latter the damages must be specially alleged, else the cost recovered would be presumed a satisfaction. This case proves, that if the damages *are* specially alleged, no such presumption can exist. So far as the reasons in that case are grounded on the amercement *pro falso clamore*, they are inapplicable here. In *Esp. Dig.* 527. *Dub.* edit. mentioned by the defendants’ counsel, *Waterer v. Freeman* is cited, in which it is expressly laid down, that “ if a man sue me in a civil suit, yet if his suit be *utterly without ground*, and that *certainly known* to himself, I may have an action of the case *against* him for the undue *vexation* and

(a) 1 *Harek. P. C.* 1. note (1).



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damage that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it." Here is no malicious holding to bail, or want of jurisdiction in the court, or of right in the defendant to recover cost, or abuse of final process. Those circumstances, it is admitted, might render a suit actionable, or aggravate damages; but they are nowhere said to be essential. The *nisi prius* case of *Rogers v. Illscombe* was an action in which maliciously holding to bail was the *only* damage alleged. It was well objected, for that reason, that costs could not be proved as a ground of damage. It was also objected, that *these* costs had been *taxed* and *paid* to the plaintiff, and that she could not go for them *again*. The judge rejected the evidence "*apparently* on both grounds." Certainly, both were very solid grounds. It was also claimed, that she might go for the *extra* costs; but to that the want of sufficient averments was particularly opposed.

It is next contended by the defendants, that the plaintiff has shown probable cause on the face of the declaration. What they claim as to the *degree* of probability, which is sufficient to shield a defendant, has been already admitted. The *least* is sufficient. But that the want of probability *must appear by the plaintiff's own showing*, is not a sound proposition. Whenever he knows, that, on the whole, he has no right to recover, it is very immaterial in what form, or when, this is presented to the court; whether in the declaration, or a special plea, on his own evidence, or that of the defendant. The position is nowhere advanced. In *Waterhouse v. Bawde*, no more is decided than the plaintiff here admits, *viz.* that to sue, without cause of action, is not, *per se*, actionable; but to sue before a court which has *no cognisance of the subject*, is, *of itself*, actionable. For example: Should I sue before a justice of the peace on a note with two witnesses for thirty-five dollars, and the defendant

show, by his plea, that one of them had become infamous, or otherwise disqualified, and thereby take away the jurisdiction of the court, this record would not, *of itself*, prove cause of action; but had I declared on a note for forty dollars, the suit, *of itself*, would have been an actionable injury. In the former instance, judgment by default would have been *valid*; in the latter, *void*. Indeed, the doctrine in *Waterhouse v. Bawde* is as applicable to an action of trespass for false imprisonment, as to a suit for vexation. For, in the instance first put, the record would justify an arrest of the defendant; in the latter, it would not. On attentively reading the case of *Fish v. Scott*, it will appear obvious, that nothing more was intended relative to the point in question, than that the circumstances of *that particular case* constituted probable cause. Lord *Kenyon* does not intend to advance the general proposition, that probable cause always exists where the defendant is put to justify. Suppose a criminal publicly convicted and punished for theft; or confined in Newgate prison, has he probable cause of action against all those who mention the circumstance? Was publication of such a fact "never reckoned innocent?" Would the publisher be justified merely "in compassion to men's infirmities?" Would his defence "admit, in some sort, guilt?" Would there even be any truth in the averment in the declaration, that the words spoken were *false and malicious*? But on this point the law is not silent. In *Waterer v. Freeman*, it is expressly laid down in these words: "I may have an action on the case against him that sues me *against his release*, or after the money duly paid; YEA, *though it be on a single obligation*." These last words are very emphatical. On an obligation with condition, the money paid might have saved the forfeiture, and the plaintiff never had cause of action at all. But on a single obligation, the payment and release are mere matter of avoidance. In the whole language of the passage

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June, 1809. read, great pains is taken to be explicit on this point.  
 If such an obligation be not conclusive of probable  
 cause, much less can the speaking of words which are  
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The case of *Sutton v. Johnstone* is strongly corroborative of the same law. The plaintiff, it is true, was ultimately defeated, because probable cause appeared on his declaration. He failed, however, because probable cause *existed*; not, as is contended, because the plaintiff *was put to justify* before the court-martial. The declaration alleged, that the defendant *well knew* the facts on which the plaintiff justified; but the court held, that those facts, though considered by the court-martial as a justification, were, as stated in the declaration, so complicated, and the inference of the plaintiff's innocence so doubtful, that the defendant might, very honestly, have *believed* the plaintiff guilty. On this ground, and this only, they held that probable cause appeared on the declaration itself. This is apparent, not from any loose opinions which fell from the bench, but from the deliberate, written reasons, of Lord *Manfield* and Lord *Loughborough*. Their language is: "The question, then, tried by the court-martial was, whether the plaintiff was justified in not obeying, by physical necessity. Now, there cannot be a question more complicated. It involves the precise point of time; the state of the winds; the state of the ship; the position of both fleets. It requires great skill in navigation. There is no question likely to excite a greater variety of opinions." Again: "Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that, by not being obeyed, the enemy were enabled the better to sail; that the defence was, an impossibility to obey—a most complicated point—*Under all these circumstances*, we have no difficulty to give our opinion, that, in law, the commodore had a pro-



bable cause to bring the plaintiff to a fair and impartial trial." Now, why are *all these circumstances* thus minutely detailed and relied on; their complicated and ambiguous nature made the *basis* of opinion; if that opinion rested, not on their nature, but on their being presented *by way of justification*. The opinion on this point amounted to no more than this, *viz.* "that, however malicious *Johnstone* might have been, as a full knowledge of all the facts stated in the declaration might have afforded, to an honest mind, some probability, that Captain *Sutton* ought, in justice, to be convicted, there was probable cause in law." If, in the case now in argument, all the facts stated in the declaration would afford some probability, to an honest mind, that the defendant *Hannah* ought, in justice, to have recovered damages of the plaintiff, then, however malicious she might have been, the declaration is insufficient. Surely, the facts are not of that complicated or ambiguous nature, which would admit such a probability.

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It is further contended by the defendants, that it is not alleged, either that the words were true, or that their truth could have been proved on *that trial*. That they were true is essentially involved in the allegation that the defendant, *Hannah*, knew them to be true. What does not exist may be *believed*, but cannot be *known*, to exist. As to the other allegation, if it must be presumed, that the "public in general," who also knew them, were all incompetent witnesses, yet, as no allegation of the sort is necessary, the declaration is good without it. Suppose a promisee had received full payment on a note to a great amount, delivered it up to the promisor; afterwards surreptitiously taken it back, and commenced an action upon it. After the defendant had been long vexed with imprisonment and expense, trial approached, when the plaintiff, appalled with his own guilt, suffered a nonsuit. Long after the time of

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trial had elapsed, he made ample confessions, which were the first proof the defendant could obtain. Would not the injury be actionable? In the case now before the court, a *judgment* for the defendant would, indeed, from rules of sound policy, have been a technical bar, by precluding all inquiry as to probable cause; but as the result has left it open for investigation, the court cannot inquire how unfortunate the plaintiff *might* have been, in obtaining testimony for the trial.

BY THE COURT. This declaration contains all the averments necessary to support an action for a vexatious suit. It is expressly averred, that the former action was altogether groundless, and known to be so to the plaintiff, and yet, with an intent to vex, the action was commenced, and prosecuted, until great expenses, sufficiently specified, were occasioned. These averments leave no room for probable cause; and the plaintiff, under this declaration, might have proved, that the defendant had declared, that she knew she had no cause of action, but had commenced it with an intent to vex the plaintiff, without any expectation of a recovery. More complete vexation and malice cannot be imagined; and if this action will not lie, it is impossible to state one that will.

It has been laid down as a general proposition, that where in the original action the defendant was obliged to set up some collateral matter, by way of justification, which does not appear on the declaration, probable cause is admitted. This proposition is unsupported by precedent or reason. When a justification goes on the ground of a denial of the cause of action, it no more admits a probable cause than the plea of not guilty. The present plaintiff, in the action of slander, justified on the ground, that the words charged to have been spoken by him were true. This was an absolute denial of the cause of action; for it is essential to slander, that the

words spoken should be false; if they are true, the plaintiff has no cause of action. June, 1809.

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It is not necessary to decide whether a minor would be liable, in any case, for a vexatious suit; for though it appears, that the plaintiff in the original action was a minor, when the suit was commenced, it also appears, that she was of full age before the return-day, and that she afterwards knowingly prosecuted the suit, with the same intent to vex.

We are, therefore, of opinion, that there is error apparent in the record before us; and that the judgment be reversed.

Judgment reversed.

ASAPH ABBY against JEREMIAH GOODRICH.

MOTION for a new trial.

This was an action of trespass *quare clausum fregit*, brought originally before Seth Overton, Esq. a justice of the peace. The defendant pleaded title; whereupon the cause was removed to the county court, according to the provisions of the stat. tit. 165. c. 1. s. 18. and thence came by appeal to the superior court.

that of *A.* In an action of trespass *quare clausum fregit*, brought by *B.* against *C.*, to which the defendant pleaded title, claiming that the dividing line between his land and that conveyed to the plaintiff was west of the *locus in quo*, *A.* was offered as a witness to disprove the defendant's claim, after a release from the covenants in his deed had been executed by the plaintiff to him: Held, that *A.* was an incompetent witness, being interested to establish the dividing line as far eastward as possible, and that the release did not restore his competency, as the covenants in his deed ran with the land.

*A.* conveyed to *B.* with covenants of seisin and warranty, a piece of land containing thirteen acres, bounded north and south by undisputed limits, east by the land of *C.*, and west by



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On the trial of this cause, it appeared that the controversy depended upon the *boundaries* of a piece of land, conveyed with covenants of seisin and warranty, by *Ebenezer White, David White, and Daniel White* to *Samuel Abby*, the plaintiff's father, who devised the same to the plaintiff. This piece of land, by the terms of the deed, contained thirteen acres, and was bounded north and south by undisputed limits, east by the defendant's land, and west by land of the grantors. The defendant contended, that the dividing line between his land and the plaintiff's was west, and the plaintiff that it was east, of the *locus in quo*. To disprove the defendant's claim, and support the plaintiff's, *Ebenezer and David White* were called as witnesses. The defendant objected to their admission, on the ground that by virtue of the covenants in their deed, they were interested in the event of the suit, and incompetent. An instrument was then produced, executed by the plaintiff, with all the formalities required in a conveyance of land, releasing and discharging "the said *Ebenezer and David*, and each of them, their, and each of their heirs, executors, and administrators, from the covenants and obligations entered into by them as aforesaid, jointly with the said *Daniel White*, in the said deed to the said *Samuel Abby*, and from all their covenants of seisin and warranty contained therein." The defendant insisted, that the witnesses offered were still incompetent; and of that opinion were the court, and rejected their testimony.

A verdict being found for the defendant, the plaintiff moved for a new trial; and the court reserved the question for the consideration of the nine judges.

*Ingersoll*, in support of the motion, contended, that the verdict in this case could never be given in evidence in any action, to which the *Whites* should hereafter be parties.

*Daggett*, contra, stated, that the only question was, as to the operation of this release. He contended, that a deed of land in fee simple is a covenant which runs with the land, and binds the parties *in infinitum*; that although *Abby* and his heirs would be bound by the release, yet the assigns of *Abby* would not be bound, and could, notwithstanding the release, have an action against the *Whites* and their heirs.

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BY THE COURT. The question on this motion is, whether *Ebenezer* and *David White*, who, with *Daniel White*, conveyed to *Samuel Abby*, under whom the plaintiff claims, all the title and claim, which the plaintiff has in the land in dispute, by their joint deed, with covenants of warranty and seisin, are so interested in the event of this suit, that they cannot be admitted as witnesses on the part of the plaintiff, to testify concerning the metes and bounds and location of the lands by them conveyed in their deed, and the dividing line between their land and the plaintiff's, and between the plaintiff's and the defendant's; notwithstanding the plaintiff has executed to them an ample release of all his claim and demand on said covenants, by an instrument in writing, duly executed, acknowledged and recorded?

The deed from said *Ebenezer*, *David*, and *Daniel*, was a conveyance of thirteen acres, bounded east on the lands of the defendant, and west on the lands of the grantors. The witnesses offered are directly interested in fixing the dividing line as far eastward as possible on the land claimed by the defendant; because having sold only thirteen acres off the east end of the tract they owned, the farther to the east they can fix the line, and location of that part conveyed to *Abby*, the more land they will retain to themselves westward of it.

The release of the covenants does not, in any manner,

June, 1809. affect this interest. The plaintiff releases only his own  
 BENTON claim on the covenants: The covenants run with the  
 v land: The release contains no quit-claim of title, and was  
 DUTCHER. not a subject of record.

That this suit is in trespass, and does not preclude another trial of the same matter in an action of disseisin, makes no difference. The witnesses are interested in the event of the suit, although the decision may not be final, and the parties may, in another suit, further controvert their claims.

New trial not to be granted.

JOSIAH BENTON against JOHN A. DUTCHER.

*A.* gave a legacy to the wife of *B.* payable in three and six years from the testator's death; *C.* a creditor of *B.* attached this legacy, by process of foreign attachment, in the hands of *A.*'s executor, and demanded the same of him, on execution, before the first instalment became due, and then brought a *scire facias* against him to answer the debt out of his own estate: Held, that he was not liable.

MOTION for a new trial.

This was a *scire facias* against *Dutcher*, as garnishee in a process of foreign attachment.

The original action was against *Elisha Wells*; *Dutcher* was served with a copy in *April*, 1805; in *March*, 1806, *Benton* recovered judgment; and on the 8th of *May* following, a demand was regularly made upon *Dutcher* of the effects of *Wells* in his hands to satisfy the execution, but none were exposed, and the execution was returned *non est inventus*.

From *Dutcher's* disclosure it appeared, that *Ruluff Dutcher*, by his last will, gave *Wells's* wife a legacy of

*Qu.* Whether a legacy due to the wife, but not reduced to possession, can be attached, by process of foreign attachment, for a debt due from the husband?



700 dollars, payable in cattle and sheep at appraisement, by two equal instalments, the first at the end of three years, and the second at the end of six years, after the testator's death; that the testator died in *November*, 1803, having appointed the garnishee in this process his executor; and that in *January*, 1805, *Daniel Penfield* gave him notice of an assignment of the legacy by *Wells* and his wife.

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The counsel for the garnishee contended, that the legacy was not by law subject to attachment in his hands for the debts of *Wells*. But the court instructed the jury otherwise, and the plaintiff obtained a verdict. A motion for a new trial being made, the question was reserved for the consideration of the nine judges.

*Dwight*, in support of the motion.

1. This legacy was not subject to foreign attachment for the husband's debts, he not having reduced it to possession. It is a clear principle of law, that to give the husband title to his wife's personal estate, which came to her before, or during coverture, he must exercise some power over it; and that this is true of things in action as well as of chattels. 1 *Bac. Abr.* 480. *Co Litt.* 351. *Harg. & But. Note*, 304. In *Garforth v. Bradley*, 2 *Ves.* 675. it was held, that wherever a *chose in action* comes to the wife, whether vesting before or after marriage, if the husband dies during the life of his wife, it will survive to her. To recover a legacy to the wife during coverture, she must join. *Clark v. Lord Angier*, *Chan. Cas.* 41. cited 4 *Vin. Abr.* 79. *pl.* 28. The same principle is recognised by Lord *Kenyon* as undoubted law, in *Milner v. Milnes*, 3 *Term Rep.* 631.

But a case from 2 *Roll. Rep.* 134 will probably be cited against us. It is abridged in *Comyns' Digest*, tit.

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*Baron and Feme*, (E. 3.) thus: "So, if a legacy be given to a *feme covert* to be paid twelve months after his [the testator's] death, and the wife die within the twelve months, the interest goes to the husband; for it was vested in him, and he might release within the twelve months." But the authority does not justify the abstract which *Comyns* has given. *Montague*, Ch. J. instead of saying, "the interest goes to husband, for it was vested in him," says, "the husband had *an interest* in it before the time of payment accrued, *which interest* it is clear he might have released before the time of payment." This authority is understood by *Viner* in the same sense. 4 *Vin. Abr.* 44. *pl.* 17. That the husband has "*an interest*," which he might release, is correct; but that the property in the legacy *absolutely vests*, without any act of his to reduce it to possession, contradicts the plain principles of the common law. If, indeed, the case in *Rolle* went the length contended for by the plaintiff, this court would hesitate before they would receive the opinion of any single judge, which goes to overthrow so important and well established a doctrine. It would amount to this; that because the husband has *an interest* in the wife's personal property, not reduced to possession, it is, to all intents and purposes, his. This would completely destroy the common law principle, that to give him title, he must have possession during coverture.

2. No demand was made of this legacy of the executor, after it became payable. The first instalment was not due until *November*, 1806. The executor was not bound to pay it to any body until that time; and when that time arrived, he had, by the provisions of the will, the privilege of paying it in cattle, &c. The demand made by the sheriff on the execution was in *May*, 1806. At that time, the executor was under no obligation to pay; and no further demand was made. Of course, as the cattle, &c. were not demanded in *November*, 1806,

there has been no refusal, on his part, to pay the legacy according to the terms of the will; and, therefore, they cannot be rendered liable to pay the amount out of their own estate.

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*Brace and Bradley, contra.*

Although we do consider, that the husband might maintain an action in his name without joining the wife; [see 2 *Com. Dig.* 82. *Dub. edit.*] yet we do not consider this case as depending upon that question. The true question in the case is, whether the husband's interest (for it must be acknowledged that he has an interest which may be made absolute at his election) may not also be made absolute at the election of his creditor attaching it in the hands of the debtor? The objection is, that if this may be done, the contingent interest of the wife, suspended during the coverture, but absolute in case she survives the husband, will be defeated. But if this interest, as is admitted, may be defeated by an act of ownership exercised by the husband, why may it not also be defeated by the operation of law, applying this property to the discharge of the husband's debts? The *chattels real* of the wife, in case the husband dies first, leaving them undisposed of, survive to her, as well as her *choses in action*; but they are liable, at the common law, to process of execution in favour of the husband's creditors. 2 *Bla. Com.* 438. And if the wife's contingent right of survivorship will not avail her against the ordinary process of law, in favour of her husband's creditors, where the property is visible, it is difficult to discover a reason why this objection should be available, where the property is of a secret and invisible nature, and the extraordinary process of foreign attachment is used to call it forth. In that respect only is there a difference: the principle is the same in both cases.



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BY THE COURT. The legacy to the wife of *Elisha Wells* was payable in cattle or sheep at appraisement, at two equal payments, the first of which fell due in *November*, 1806. The defendant, as executor of the last will of *Ruluff Dutcher*, the testator, was holden to pay the legacy when due. The plaintiff obtained judgment on his suit against *Elisha Wells*, and on the execution thereon the officer made return, that on the 8th day of *May*, 1806, he demanded of the executor, as trustee and debtor to said *Wells*, the property of said *Wells* in his hands, to satisfy the execution, and that he refused to show or deliver it. This demand was made before any part of said legacy was due from the executor. No other demand was ever made. The plaintiff declares, that the defendant, executor as aforesaid, has become liable to pay and satisfy the judgment against *Wells* out of his own estate, and demands judgment for the same against him.

No such demand was ever made on the defendant as obliged him to tender the cattle and sheep, mentioned in the legacy, to the officer on the execution, or would subject him, on failure of such tender, to the payment of the amount of said legacy, or the moiety thereof, to the plaintiff in money, from his own proper goods and effects. The facts will not warrant the rendering of such judgment against him in this case. For these reasons, we consider the charge to the jury incorrect, and advise a new trial of the case.

New trial granted.

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ROBERT RAND and DANIEL RAND *against* THE PROPRIETORS OF THE UPPER LOCKS and CANALS ON CONNECTICUT RIVER.

WRIT of error.

This was a suit by the *Rands*, declaring, that the defendants were incorporated, by the legislature of *Massachusetts*, for the purpose of rendering *Connecticut River* navigable in a part of that state, by means of locks and canals; claiming for damages done them by the loss of a raft in passing through the locks, &c. of the defendants.

Serving a summons on any private individual of a corporation is not sufficient notice to hold the corporation to trial.

And the individual summoned may plead the want of notice to the corporation.

The writ commanded the sheriff "to summon *James Bull*, one of the principal proprietors and directors of *The Upper Locks and Canals on Connecticut River*, in the county of *Hampshire*, and state of *Massachusetts*, and the proprietors of *The Upper Locks and Canals on Connecticut River*, in the county of *Hampshire*, to answer," &c. In the county court, the corporation pleaded in abatement for the want of service. In the superior court, *James Bull* pleaded in abatement, that no service was made upon the corporation but by leaving a copy with *James Bull*, of *Hartford*, in this state: that the corporation is established only within the jurisdiction of *Massachusetts*, and not within the jurisdiction of our courts, and no process under our law can be served upon them, but the corporation is suable, and ought to have been sued, before the court of common pleas, or general sessions, in the county of *Hampshire*, and state of *Massachusetts*: and that no legal notice to appear and defend in this suit had been given to said corporation.

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The plaintiffs replied, and recited a law of the state of *Massachusetts*, entitled "An act for the better managing lands, wharves, and other real estate, lying in common," whereby the copy of the writ left with the clerk, or one or more of the principal inhabitants, or proprietors, is made sufficient notice to any town, precincts, parish, village, or proprietor of any common or undivided lands, or other estate: and averring, that there is no other law in that state relative to the service of writs upon corporations; and by those laws, there is no local existence prescribed to the corporation, (reciting part of the act of incorporation,) and that no law of that state required, that any member, officer, or proprietor of the corporation should reside within that state; or that any corporate act should be done there, and had prescribed no court, at which only the corporation should be sued, and are entirely silent (unless by implication) as to suits of this kind against them: and further averring, that the corporation, by their charter, are not bound to have any common property, or corporate funds, (except the locks and canals,) and although empowered to hold real estate, are not empowered to raise money, except to erect and complete the works and canals: and averring, that the corporation were within the jurisdiction of this court. The existence of the corporation in *Massachusetts* only was then traversed.

To this replication there was a special demurrer,

1. Because, under the form of a traverse, the plaintiffs have denied a negative averment in the plea, *viz.* that the corporation exists only within the jurisdiction of the state of *Massachusetts*.

2. That, under the form of a traverse, the plaintiffs have denied a mere inference of law from the facts before alleged in the plea.



3. That neither in the traverse, nor inducement thereto, is any matter of fact contained, on which issue could be joined.

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The superior court adjudged the replication insufficient: upon which the plaintiffs brought this writ of error.

*Daggett and Hosmer*, for the plaintiffs.

The notice given was sufficient. A copy was left with a principal proprietor and a director. The states of *Massachusetts* and *Connecticut* have both directed the service of suits upon corporations; and although these statutes do not literally extend to all corporations, yet, by analogy, the same service may be made. Our statute does not prescribe the mode of service upon a bank; but the court will, doubtless, recognise the service prescribed in suits against other corporations. Not only by the laws of *Massachusetts*, but upon general principles, the service is good; for *lex neminem cogit ad impossibilia*; and no other service could be made but this. And indeed, by the plea, it does not appear that there is in *Massachusetts* a single member of this corporation, or that any other service could be made there, than has been made here. But if the service has not been made according to any existing statute, and in fact there is no statute upon the subject, the court will only look to see if reasonable notice is given; as was done by the court of the *United States* in the case of *Chisholm, Executor, v. State of Georgia*, 2 *Dal.* 419. and if reasonable notice has not been given, will continue the case, and direct notice. 3 *Dal.* 335. The courts of the *United States* have no more authority as to prescribing notice than our courts have.

But it is said, the corporation can be sued only in the

June, 1809. state of *Massachusetts*. The plea does not show the possibility of a suit in that state. It ought to show what courts have jurisdiction, and how they have jurisdiction, and in what manner service can be made, so that the plaintiffs might be enabled to proceed upon safe ground. Every plea to the jurisdiction must show a better and more sufficient jurisdiction. *Mostyn v. Fabrigas, Cowp.* 172. 181.

Again, the corporation have no local existence; and it does not appear, that any individual of it resides in *Massachusetts*. But if the defendants had a local existence there, they may, notwithstanding, be sued here, as well as an individual of that state. The action is *transitory*, and either person or property will give jurisdiction to the court; and the property of *Bull* is liable. *Harvey v. East-India Company, 2 Vern. 396. 6 Vin. Abr. 310.* So, if a suit is brought against a town, society, bank, city, &c. the property of the individual inhabitants and stockholders must be liable on the execution. Corporations constituted by another state may bring suits in this state; and Judge *Paterson* decided, that they might be sued in a state where they were not incorporated.

It is not by the plea denied, that the defendants have property in this state, upon which the execution may be levied. But were it otherwise, and the plaintiffs could not derive the benefit from the judgment that they expect, this can be no reason why the court should refuse to give them a judgment. When the national court were asked, what could be done with an execution against a state, it did not prevent them from granting it; but the court said, it would be time enough to decide it, when the difficulty came before them. And surely, if the defendants are duly notified, it is improper to inquire what benefit will result from the judgment.

But the facts relative to the service are not before the court. The court can take no notice of the facts stated in the plea. The plea which was before the county court is waived: and *James Bull* now appears as a *natural person*, and pleads to a suit brought against a *civil person*.

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It is therefore a mere nullity. The *defendants* have made no answer to the declaration; and if any objections could have been made to the notice, they must be considered as abandoned.

*Dwight*, for the defendants.

It is said, the court are not bound to notice the plea, because it is the plea of *James Bull* only, in his individual capacity. But *James Bull* having been summoned, it is certainly proper for him to inform the court of the irregularity of the proceedings against him, especially as those proceedings might seriously affect his property. And he could plead in no other way. An individual member of a corporation cannot use the corporate name and seal, and thus constitute an attorney for the corporation.

The facts thus disclosed show, that no legal notice has been given. The notice given is certainly not such as is required by the common law. In *England*, there is no mode to compel a corporation to appear by a process against the individual members. 1 *Kyd on Corp.* 272. 1 *Tidd's Prac.* 209. *Mills's case*, *T. Raym.* 152. But the process must be against the property of the corporation. *Rex v. Gardener, Cowp.* 85. *Rex v. Windham, Cowp.* 377. *London v. Lynn*, 1 *H. Bl.* 209. 5 *Com. Dig.* 569. And if the corporation has neither lands, nor goods, there is no way to compel an appearance, except by the authority of parliament.



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Service has not been made in conformity to our statute, (which was made nearly a century before this corporation existed,) for no copy has been left with the clerk, selectmen, or committee-man, as is directed in the cases provided for by that statute. Because this service is not consonant to the statute, nor common law, the statute of *Massachusetts* is interposed. Without inquiring whether this service is in pursuance of that statute, it is enough to say, that the statute of one state can never be admitted to direct the service of process in another. It is required by no principles of comity, and is repugnant to every idea of independence. As well might an officer of that state be permitted to execute process in this, as to admit that an officer of this state is to be directed as to the manner of serving that process by the laws of another state. *Pearsall v. Dwight*, 2 *Mass. T. R.* 84. *Lodge v. Phelps*, 1 *Johns. Cas.* 139.

But a corporation cannot be sued out of the state which constituted it. There is the property of the corporation. It cannot hold lands in another state, unless by comity. And if, as has been shown, judgment can go only against the property of the corporation, there is surely no necessity to go out of the state which created it. Where there is no corporate property, a judgment is utterly unavailing, and cannot be enforced, any more than a judgment against an individual in a foreign country having no property here. And the court will not employ themselves in rendering a judgment which must be entirely nugatory.

But it seems to be claimed, that the property of each individual stockholder is liable. This certainly is contrary to the principles of the common law; and would be productive of the most dreadful consequences. Upon this principle, every individual, who owned a share in the *Gloucester Bank*, (if found in this state,) might be

loaded with the immense debt of that institution; and no member of a town or society could travel in another state without being liable to process for any claims which individuals might make against such town or society. Before our courts proceed upon principles attended with such consequences, they surely will require the party claiming to establish them to show that part of the act of incorporation, which subjects the defendants to such penalties.

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By THE COURT. In this case, the writ and process has been no otherwise served than by leaving a copy thereof at the usual place of abode of *James Bull*, of *Hartford*, in *Connecticut*, who is described therein as one of the principal proprietors, and one of the directors of the corporate body.

Serving a summons upon any private individual of a corporation is not due and legal notice to the corporate body.

Judgment affirmed.

JAMES R. EDWARDS and JAMES DOWNS *against* DANIEL  
BEACH.

WRIT of error.

*Beach* brought his action of trespass to the county court against *Edwards* and *Downs*, declaring, that he was a tavern or innkeeper; that he was the owner of a certain painted board or sign, on which was written his name and occupation, to enable him to obtain custom; that the same was suspended before his house in the

In trespass *vi et armis*, the damages are not limited by the value of the property destroyed.

June, 1809. highway, and was of the value of *twenty dollars*; and the  
EDWARDS defendants, with force and arms, took and carried away,  
V. and burned and destroyed said sign; whereby the plain-  
BEACH. tiff wholly lost the same; to his damage one hundred and  
fifty dollars.

*Beach* appealed the cause to the superior court; where he recovered a verdict and judgment for *fifty dollars*. To reverse which, this writ of error is brought, alleging that the superior court had no jurisdiction, and that the verdict could not exceed *twenty dollars*, the value of the sign.

*Daggett*, for the plaintiffs in error.

The question is, whether in trespass, it is competent for the court and jury to give damages beyond the value of the property specified in the declaration. Here, the only *gravamen* stated is the destruction of the sign: There is not even the common allegation of *et alia enormia*. For destroying the sign only can damages, therefore, be given; and the sign is valued at *twenty dollars*. If greater damages be given, then there can be no rule of damages in this action.

The defendant does not come prepared to controvert the value, beyond the sum specified. And it is to be presumed, the plaintiff will always state the value of his property high enough; and when he has thus given his own rule of damages, he ought not to be permitted to claim more.

Where an *important right* is in question, in an action of trespass, the court have given damages to indemnify the party for the expense of establishing it; as in suits for flowing lands, or for keeping up a gate. But in



those cases, there was nothing to *limit the damages*, as June, 1809.

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*Ingersoll* and *R. M. Sherman*, for the defendant in error.

There is no rule to be found, that in trespass the value of the property destroyed shall be the measure of damages. The reason why a *value* should be stated at all is, that it may appear to be *property*. If no value is stated, a declaration in trespass would be good after verdict, though it would be otherwise in trover; for in trover, the conversion of the property is the ground of action, and the value of it the measure of damages. But in trespass, the *gist* of the action is the *force*; and the circumstances attending it may aggravate the damages; and the destruction of the property is one of those circumstances. It is admitted, that *Beach* could not show, that the property was worth more than is stated in the declaration; but he has a right to recover for *other injuries* than the *loss of a sign*. In torts, there can be no specific rule of damages; the question must be, what is the *injury*, not what is the worth of the property injured. Were a stone thrown into the room of a house usually occupied by a family, could it be seriously contended, because a shilling would replace the glass, that a shilling should be the amount of damages?

A more liberal principle has been adopted; and the superior court have decided, that for an injury to a turnpike-gate more might be recovered than the actual damage done to the gate.

BY THE COURT.

This is an action of trespass *vi et armis*, and sounds in damages.

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v.  
LEWIS.

The declaration charges a violation of the plaintiff's right of property and possession by force, and the abduction and destruction of property of a certain value. The value of the property, or the amount of the injury done to it, is not the only ground of damages: the plaintiff is entitled to recover for the force and injury, according to the nature and circumstances of the case, and the aggravations attending it, as well as for the value of the property taken. Were it otherwise, a person so disposed might forcibly dispossess another of any article of property at his pleasure, and compel the owner, however unwilling, to accept of the value in its stead.

Judgment affirmed.

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HEZEKIAH BAILEY, JAMES JUDSON and GIDEON BEARDSLEY, Committee of the Presbyterian Society of NEW-STRATFORD, against FREDERICK LEWIS, WILLIAM SCOTT, ABNER CABLE and WILLIAM WHEELER.

A bond was given to A, B. and C, committee of an ecclesiastical society, and to their successors in office; after the removal of the obligees named in the bond, the successors brought an

THIS was an action of debt on bond, in the penal sum of 1,200 dollars, executed by the defendants to *Elisha Hawley, Ezra Lewis and Ephraim Sherwood*, a committee of the presbyterian society of *New-Stratford*, and to their successors in office, alleging that the plaintiffs are successors in office to the obligees named in the bond.

The defendants having prayed oyer of the bond and action on the bond in their own names: Held, that the action was well brought.

Where a fund was bequeathed to the ecclesiastical society of *N. S.*, the interest of which was to be applied for the purpose of maintaining a free school in one of the districts, it was held, that an agreement by the society to divert this fund from the object for which it was given, and apply it to the support of the ministry, was void, being a fraud upon third persons.

condition, it appeared that the bond was to be void on the payment of 800 dollars by the first of *April* (then) next, to the said obligees, or their successors in office. The plea then alleged, that *A. G. Scott*, on the 25th of *May*, 1805, made his will, and therein, among other things, directed that his notes and money be placed on ample security at interest, at the discretion of his executors, and the parish of *New-Stratford*, (or their agent,) and the interest paid annually to his wife *Susan*, for life, and at her decease, the principal to belong to the parish of *New-Stratford*, the interest of which to be applied for the purpose of maintaining a free school in the *Centre District*; his *Sharp* house and land to be sold, and the avails applied with the other money. The plea further alleged, that *Scott* died on the 12th of *October*, 1805, and on the 25th, the will was proved and approved, and an appeal taken to the superior court by the defendants, his heirs at law; that on the 5th of *January*, 1807, while the appeal was pending, said society agreed with the defendants, that they should execute this bond for 800 dollars, (estimated at one quarter of the amount given by the will to the society,) and that thereupon the society would desert their trust, and would prevent the application of the money to the school district, and apply it to the support of the gospel, and that if it ever was applied otherwise, the heirs should recover it of them; that the bond was executed in pursuance of this agreement, and for no other cause or consideration; that the defendants no further prosecuted their appeal; and that the society, on the 5th of *January*, 1807, deserted their trust, renounced all claim to the legacy, and resigned up to the defendants all sums of money which might accrue to them by the will. The plea also alleged, that the plaintiffs were prosecuting this action for the sole and exclusive benefit of said society.

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To this plea there was a demurrer; and the superior court adjudged the plea to be insufficient.

*Daggett*, (a) in support of the judgment.

1. This action cannot be sustained by the plaintiffs in their own names. If a bond be given to a certain inn-keeper, merchant, &c. *and his successor*, the individual who happens to be the actual successor, cannot maintain an action in his own name. The term *successor* is applicable only to a corporation; and if it be inserted in an obligation to any other, it is to be rejected as surplusage. 6 *Vin. Abr.* tit. *Corporations*, (G. 6.) p. 275. Are the committee of an ecclesiastical society a corporation? They clearly are not at common law. No statute has made them such.

It is inquired, who shall sue? It is not necessary to say that the *society* shall sue. There are obligees named in the bond. It does not appear that these persons are dead; but if any of them are dead, their survivors may sue. On the principle for which we contend, it does not vary the case, that the nominal obligees are removed from office, and others appointed in their place; for the addition of the office to their names is merely *descriptio personarum*, and the words "to their successors" are inoperative.

Will it be contended, that the statute under the title of "*Ministers*" gives the plaintiffs, as the society's committee for the time being, power to bring an action on this bond? Over what species of property have the legislature given the committee the powers there specified? Over such only as has been granted or seques-

(a) *Chapman* was to have argued on the same side, but was not in court when the cause came on.

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tered for the use and support of the ministry. See both the preamble and enacting part of the 16th section. The powers given by the 17th section relate to the same subject matter, and are given "for the purpose and end aforesaid," referring to the preceding section. The 18th section gives the committee for the time being *the same powers* as their predecessors had, but no other powers. In this case, the property was not bequeathed for the support of the ministry, but for a very different object, *viz.* that of maintaining a free school in a particular district.

2. The consideration of this bond was illegal, being a fraud upon third persons. It was given upon an agreement made to defeat a trust—to abandon a valuable interest belonging to the *Centre School District*, and apply it to an object totally diverse. The education of children was the testator's object. This arrangement applies the fund to the support of the *Presbyterian Ministry*. *Willis et al. v. Baldwin*, Doug. 450. and *Jackson v. Duchaire*, 3 Term Rep. 551. were cited.

*R. M. Sherman and Hatch*, contra.

Two objections are taken to a recovery:

First, it is contended, that a bond made to a society's committee, and their successors in office, will not support an action in favour of such successors. To determine the force of this objection, it is necessary only to advert to the provisions of our statute on the subject,<sup>(a)</sup> and to the course of practice and decisions under it. For it is not claimed, upon the general principles of the common law, that this action would be sustainable, in favour of the present plaintiffs.

(a) Tit. 114.

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The 16th section of the "Act for the settlement, support, and encouragement of ministers," &c. authorizes, in general terms, the selectmen of a town, where there is but one ecclesiastical society, and the committees of ecclesiastical societies, or a committee appointed by a town or society, for that end, as the case may be, to demand, receive, take care of, and improve, the lands, moneys, &c. sequestered, or given, for the support of the ministry, in such town or society, according to the true intent and design of the grant, donation, or sequestration. To facilitate the execution of this trust, it is provided by section 17. "That the selectmen, and committee aforesaid, or the major part of them, shall and may make all necessary contracts, and commence, prosecute, and pursue all needful suits, actions and causes in the law, for the purpose and end aforesaid." Then follows section 18. which gives to the successors of such selectmen, or committees, "the same power, *in their own names*, to act, appear, prosecute, and pursue in and upon *any* contract, suit, action, or cause, for and concerning the matters aforesaid, *as fully* as those, whom they succeed in the office aforesaid, *might, or could do*, if they had not been removed."

It may be asked here, what force, or effect, can be given to the clause last recited, upon the construction contended for on the other side? It was not surely inserted for the mere purpose of authorizing successors to sue, *in their own names*, upon a contract to themselves. This would be simply declaring, that such successors, when appointed, should be a committee; and would be repeating, in substance, the provisions of the clause next preceding. This section does not particularly regard the case of a contract made to successors, by name, after their election to office; but it gives them the general power, "in their own names," to prosecute, &c. "upon *any* contract," &c. as fully as those



whom they succeed, *might* have done, if they had not been removed. It is not necessary, indeed, to discuss, or determine the question, whether successors may maintain an action, in their own names, on a contract to a former committee simply, without naming successors. It is enough for us to show, that this may be done, where the contract or obligation is expressly made to the former committee, and their successors, *eo nomine*.

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The practice and decisions upon this clause of the statute, so far as they have been ascertained, have been in perfect conformity to the ideas here advanced. It is understood to have been the constant practice for successors to sue in their own names, in such cases; and it is known, that in some instances, where this point has been made, the decisions of the superior court have sanctioned the practice. The case of *Judd et al. v. Woodruff*, 2 Root, 298. and that of *Bierce et al. v. Kellogg*, (a) decided in *Litchfield* county, *August* term, 1808,

(a) JOSEPH PIERCE ET AL. Committee of Donations for the First Ecclesiastical Society in *Cornwall*, against JUDAH KELLOGG, Executor of the last will, &c. of NEHEMIAH BEARDSLEY.

*Superior Court, Litchfield County, August term, 1808.*

THIS was an action on a note for 120 dollars, given by the testator to *John Culhoun* and others, committee, &c. and their successors in said office, dated *January* 6th, 1804.

In 1802, the testator and several other persons undertook to raise, by subscription, a fund for the support of the ministry in the first ecclesiastical society in *Cornwall*. An instrument was drawn up, which they called a *charter of donations*. In this, they agreed to raise the sum of 5,000 dollars, or upwards, for the support of the ministry, and directed the manner of appropriation. The principal sum was always to be kept untouched, and the interest to be applied to the payment of a minister. They agreed also to give their notes to what they called the *committee of donations*, payable on demand, and the interest payable annually, for the same by them severally subscribed to the

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fully warrant this assertion. In the former of these cases it was determined, that where land is granted to a society's committee, and *their successors*, the latter may maintain ejectment in their own names. In *Bierce et al. v. Kellogg* it was decided, that successors may sue, in their own names, on a note of hand to a former committee, and their successors. The question there arose upon demurrer, and was fully considered. The only difference between that case, and the one at bar is, that, in the for-

charter; and if the notes should be paid on *any 13th day of December in any year*, they might be paid in cattle, iron, &c. and the charter was to become obligatory on the subscribers, provided the society should accept it, and become responsible to make good any deficiency that might by any accident happen to be made in the amount of the fund, so as to keep it good, on or before the 1st of *December, 1803*, and have it recorded in their records. There were subscribers to this charter to the amount of about 4,000 dollars, among whom was the testator, who subscribed 120 dollars. The charter was accepted by vote of the society, and recorded in *May, 1803*. In the charter it was also provided, that the society should annually appoint a committee, to be called a *committee of donations*, who should have the care of the fund; and that the several subscribers should execute their notes to this committee for the amount of their subscriptions.

The testator executed his note to *John Calhoun* and others, *committee of donations for the first ecclesiastical society in Cornwall, and to their successors in said office*, on the 6th day of *January, 1804*, for 120 dollars, the amount of his subscription. The interest on this note was regularly paid, and endorsed, till *January, 1807*; when the testator died, and the executor refused to pay either principal or interest.

In *March, 1808*, an action was brought on the note in the name of *Joseph Bierce and others, committee of donations, &c.* and successors in said office to *John Calhoun, &c.* The manner in which this committee originated was shortly stated in the declaration. The cause was appealed to the superior court. The defendant in his plea recited the whole of the charter of donations, and averred that the note was given in satisfaction of the subscription to the charter, and then averred that the society had not made themselves liable to make good deficiencies which might happen in the fund, and that deficiencies had happened by means of sundry losses which were particularly set forth in the plea.

mer, the note was given to a committee, appointed by the society to manage its funds, in pursuance of the powers conferred by section 16th of the statute; a circumstance, which did affect the decision, and which does not render it the less applicable to the point in debate. Indeed, in one case, the superior court went much farther, and determined, that even the deacons of a church might support an action in their own names,

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The plaintiffs traversed that part of the plea, which related to deficiencies in the fund, and set forth the vote of the society accepting the charter.

To this there was a demurrer.

The first and principal exception was to the declaration: That it ought to have been brought in the name of the society, and not in the name of the *committee*. And 1 *Root*, 440, 441. was cited, and much relied on. It was urged, that the committee of donations was a committee not known in law; that they had no beneficial interest; and that they could not maintain an action.

It was also insisted, that as 5,000 dollars had not been raised, no right of recovery existed in favour of any person or corporation: the condition on which the right was to vest not having been complied with.

To the first exception it was replied, that the cause of action was founded on a contract between the parties; that the testator himself had designated the persons to whom he would pay the amount of his note; that he had expressly contracted to pay to them, and to such persons as should be appointed to succeed them in their office; *that he had also agreed, that the society should appoint a committee under that denomination; that as the contract was express, no action could be maintained in the name of the society; and 1 Root*, 53. *2 Root*, 298. *Swift*, 182, 183. *Statutes of Connecticut*, p. 317, 318. were cited.

To the 2d exception it was replied, that the testator had given his own construction to the charter. It was nowhere said, that if 5,000 dollars were not raised, their subscription should be void; and as the subscriptions had all been made, and the charter accepted by the society, and recorded, long before the note was given; and as he had paid interest on the note several years, it should not now be permitted him to



June, 1809. on a note given to the former deacons, and their successors in office. 1 *Root*, 53.

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But further: if this action be not sustainable by the plaintiffs, it may be asked in whose favour it would be sustained? It will not do to say, that it should have been brought in the name of the committee, to whom the obligation was made; for the 18th section of the statute gives to successors the power to *appear* and *prosecute*, &c. "in their own names," "upon any contract," "as fully as those whom they succeed," "*might, or could do, if they had not been removed.*" This clause, at once, recognises a disability in the former committee, to appear and prosecute, &c. and declares the power of their successors. It will hardly be pretended, that the action could have been maintained, by the inhabitants of the society; for that would be doing violence to the terms of the obligation.

It is objected, however, that the fund, secured by this bond, is not a *donation* for the support of the ministry; and, therefore, that the bond itself does not come within the purview of the statute. This argument proceeds upon an unwarranted assumption in point of fact. The legacy bequeathed by *A. G. Scott* was not, indeed, applicable to the support of the ministry; but the whole amount of this bond, by the condition of it, is applicable

say that the condition on which he was to become liable had never been performed.

The court adjudged, that the replication of the plaintiffs was sufficient, and for them to recover.

*Gould and Slosson*, for the plaintiffs.

*Bacon*, for the defendant.

[*Ex relatione amici.*]

to that use, and no other. We are not now seeking to recover the legacy, but the sum due on the bond.

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2. In the second place, the defendants contend, that the consideration of this bond is illegal. They insist, that the act of the society, which is the consideration, was the desertion of a trust; and that this act was prejudicial to those for whose benefit the trust was created. Thus the bond is made to stand on the footing of contracts in fraud of third persons.

To this objection a variety of answers may be given.

First, it is denied, that any trust is created by the terms of the will. The testator bequeaths the interest of his notes and money first to his wife for her life; and then, at her decease, he directs, "that the principal shall belong to the parish of *New Stratford*, the interest of which is to be applied for the purpose of maintaining a free school in the *Centre District*." There are no words apt to create a trust, let the bequest have been made to whom it may. The language of the testator, "that the principal shall belong," &c. most obviously imports a beneficial interest. It is true, that in this clause he directs the use; but this does not militate with the construction contended for. It is said, however, that the bequest is for the purpose of supporting "a free school in the *Centre District*;" and thus that it is made in trust for the inhabitants of that particular district. The answer is, that these words merely fix, or locate the school in the place, which, probably, in the judgment of the testator, was the most convenient for the inhabitants of the society. The phrase "free school" is, indeed, vague; but, when we see it used without limitation, it is natural to conclude, that the school was intended to be free, at least, to all persons concerned in the bequest. There is not a single expression in this clause, from

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which it can be collected, that the inhabitants of the *Centre District* were selected by the testator, as exclusively the objects of his bounty.

Secondly, whether a trust were created or not, still it does not appear that the society of *New Stratford* was appointed to execute that trust. This fact, being the sole foundation, on which this part of the defence rests, ought to have been distinctly averred in the plea. Yet it is nowhere averred, that the legacy in question was given to the inhabitants of this society, in trust, or otherwise. It cannot be concluded, therefore, that the society had any interest in the legacy, or that any trust was created, which it could have accepted, or executed. Nor, as the plaintiffs contend, was the bequest, in fact, made to that society. By the terms of the will, the sum bequeathed is given "to the parish of *New Stratford*;" but, it should be remembered, that this is not the corporate name of the society, and that a corporation cannot acquire a name by reputation.

But if this ambiguity can be aided by construction, or extrinsic evidence, so as to give the will effect, that construction ought to be resorted to, which involves the fewest difficulties. The intent of the testator most probably was to give the legacy to the school society within the limits of the same corporation, to support a free school, for the benefit of all the inhabitants to be located in the *Centre District*. This interpretation is the most liberal; it best comports with the language of the testator; and particularly, it saves the necessity of supposing a trust, which the terms of the bequest do, by no means, create.

Thirdly, if we admit that a trust of the precise nature claimed by the defendants, were in fact created, and that the society of *New Stratford* were appointed trustee;



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still, we maintain, it would have been incompetent for that corporation to have accepted and executed it. All corporations, in this state, are created by statutes, which uniformly define and limit their powers: But we have no statute which gives to ecclesiastical societies the power to have the oversight and superintendence of schools, or to manage their funds. Indeed, we have one, which seems wholly to negate the existence of such powers; for it provides, that such societies "shall have no power to act on the subject of schooling." (a) But aside from this provision, the general rules of law do not permit the execution of such a trust, by a corporation, without a special delegation of authority. Judge *Blackstone* says, that a corporation "cannot be an executor, or administrator, or perform any personal duties." (1 *Bl. Com.* 504. 1 *Lev.* 227.) Aggregate corporations cannot be feoffees in trust for the use of others; (*Went. Off. Ex.* 17. 25.) nor can they be made joint-tenants, or trustees. (*Jac. Law Dict. Tomlins's* edit. tit. *Corporations.* 2 *Fonbl. Eq.* 143, 144. and cases there cited.) In short, such corporations cannot interfere with affairs foreign to their institution, and not necessary to the purposes or ends of it. On the other hand, it is the appropriate business of a school society to execute such a trust. It is one of the ends and purposes of its institution. But a school society, though constituted by law, within the limits of an ecclesiastical society, is yet a distinct corporation. (b)

Fourthly, supposing the strongest case which the defendants can claim; that the society of *New Stratford* was appointed trustee, and that it was fully competent to accept and execute the trust; still the conclusion, attempted to be drawn, does not follow. The inquiry

(a) *Stat. Conn.* tit. 10. c. 1. s. 6.

(b) *Stat. Conn.* tit. 10. c. 1. tit. 141. c. 1. 2 *Hent.* 458, 466.

June, 1809. is, whether the entire contract between the society and the heirs of *A. G. Scott* be void, as being made in fraud of third persons? Before the affirmative of this question can be settled, it must be made to appear, first, that some act stipulated for, and to have been done in pursuance of the contract, tended to prejudice the rights of others; and secondly, that it was such an act as the party undertaking had no right to perform. It is believed, that in every case in the books under this head of unlawful contracts, these plain principles are recognised. In the cases of *Willis et al. v. Baldwin*, (*Doug. 450.*) and *Jackson v. Duchaire*, (*3 Term Rep. 551.*) which are the only authorities cited in this branch of the argument for the defendants, the acts stipulated for, and on the ground of which the contracts were holden to be illegal, tended directly to injure third persons. These cases, indeed, could not have been cited as determinations in point, but only as establishing or illustrating the general doctrine, on which this part of the argument for the defendants proceeds. The general doctrine, however, is not questioned; the only controversy is respecting its limitations.

We ask, then, was there any act to be done by the society of *New Stratford*, which that corporation had not a right to perform, or which tended to injure others? What has the society done, or obligated itself to do? It is nowhere averred, that any act has been performed, or agreed to be performed, *with an intent* to defraud. Indeed, for aught that appears from any direct averment in the plea, the contract was entered into with the most upright intentions.

What then is the ground of complaint against this contract?

1. That the society contracted, as it is alleged, to pre-

vent the fund created by the will of *A. G. Scott* from being applied to its appointed use. But it does not appear from the record that any such stipulation was made.

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2. That the society, as a part of the contract, agreed to refuse, and did in fact refuse, the trust, *in consideration of a sum of money*, which the defendants obligated themselves to pay. But if the act of declining the trust were indifferent, or innocent in itself, its character is not altered by the circumstance that the society was paid for it.

3. That the sum secured by this bond is to be applied to support the preaching of the gospel. Yet, if this were even an unlawful use, which will hardly be asserted, the strength of the obligation would remain unimpaired.

4. That the society took upon itself to refuse or *desert* the trust, appointed by the will of *Scott*. To this averment, we answer, that the society was not bound by the appointment of the testator, and, of course, has violated no obligation, by refusing the trust. The case is not, in this respect, distinguishable from that of an executor, or a testamentary guardian. Who will say, that one appointed to such a trust is bound, at all events, to accept and execute it? It is not pretended, that the society had done a single act, prior to the date of the bond, from which an acceptance of the trust could be implied. The executor had caused the will to be proved and approved, and the defendants, who were heirs of *Scott*, had taken an appeal. Thus the matter stood; no trust had been accepted; no funds had been received; and, as yet, it was even doubtful whether the will would be established.

But further, the refusal of the society did not tend, in the smallest degree, to prejudice the rights of those



June, 1809. for whose benefit the trust, if any, was created. Those rights are left unimpaired. Upon a proper application, chancery will supply a trustee; and thus the funds provided by the will are still liable to be called out of the hands of the representatives of *Scott*, and applied to their proper use. 2 *Fonbl. Eq.* 146.

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The plea of the defendants, therefore, goes merely to show, at most, that the bond is without consideration; not that it is illegal. But it is an ancient and well established rule, that a mere want of consideration cannot be averred against a bond.

BY THE COURT. In this case, two questions arise: First, whether this action can be supported by the plaintiffs, as successors in office to the obligees in the bond? Secondly, whether the bond is not void, as tending to defeat the obvious intentions of the deviser, and operating a fraud on third persons?

1. This bond being given to certain persons by name, the action might well have been brought in their names, upon principles of common law, although they are described as "committee;" and by the express words of the statute, the same powers are given to their successors to sue in their names, as the predecessors had. The court are, therefore, of opinion, that the action is well brought.

2. But they consider the attempt to divert this fund from the objects of the deviser's bounty as unwarrantable in point of law, and a fraud upon those interested in the establishment of a school according to the will; and on this ground, the court affirm the judgment of the superior court.

Judgment affirmed.

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HEZEKIAH HUNTINGTON *against* DAVID TODD.

## WRIT of error.

This was an action of *assumpsit* by *Huntington* against *Todd*, before *Thaddeus Leavitt*, Esq. justice of peace, declaring, that in *October*, 1799, and *November*, 1799, the plaintiff, in behalf of the defendant, and for his use and benefit, delivered two writs in favour of the defendant, against *Elijah Granger*, to *Elihu Kent*, a constable, to serve and return; and being duly served, *Kent* charged his fees to the plaintiff; which was wholly unknown to the plaintiff, until *May*, 1806; and the same was never settled by *Todd* with *Kent*, nor the plaintiff, nor ever charged upon book by the plaintiff to the defendant, nor ever released by the plaintiff; and the plaintiff was by law holden to pay the same to *Kent*, with interest. And on the 30th of *May*, 1806, the same was demanded by *Kent*, and then paid by the plaintiff, to the amount of 7 dollars and 15 cents. And on the 20th of *June* next, the plaintiff gave notice to the defendant thereof, who thus became liable to pay the same to the plaintiff; and being so liable, *assumed and promised to pay, &c.*

After judgment in an action of *assumpsit*, the promise alleged may be considered as an express or even a written promise.

That *H.* being liable to pay the debt of *T.* did pay it, is a good consideration to support a promise by *T.* to repay *H.*

The case was tried upon the general issue. Judgment for the plaintiff. The defendant appealed; and at the county court pleaded in bar, that the plaintiff, as his attorney, instituted the suits, and delivered the writs to the officer; and that on the 29th of *October*, 1803, the plaintiff rendered his account, and the plaintiff and defendant then settled all book accounts, and the plaintiff gave to the defendant at that time a receipt, in which he acknowledged that "*all book accounts*" (between them) "*were settled and satisfied.*"

June, 1809. To this plea the plaintiff demurred.

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The county court adjudged the plea sufficient; and a writ of error being brought, their judgment was affirmed in the superior court.

*Daggett*, for the plaintiff.

1. The money paid by the plaintiff to *Kent* was not necessarily a book debt charge. Money paid by one for another may be a proper charge on book, but is not necessarily so, and cannot now be presumed to have been so. The plea, therefore, is no answer to the plaintiff's claim.

2. This charge was not included in the settlement made. If it was not necessarily a charge on book, it was not necessarily included in the settlement; and the defendant must show that it was included. "All book accounts were settled;" but this was not then a book account of the plaintiff. The right of an attorney to charge the plaintiff with the service of a writ does not arise *eo instanti* he delivers a writ to an officer; for the officer has a right to charge the service either to the plaintiff or the attorney who delivers it. *Huntington*, therefore, could not properly charge *Todd* until he had paid *Kent*, or knew that *Todd* had not paid *Kent*, and that *Kent* had charged him. It is averred, that he did not know of this charge by *Kent* to him until after the settlement with *Todd*; and if the propriety of his charge depended upon his knowledge of *Kent's*, the want of that knowledge may with propriety be alleged in his declaration.

Again: as *Huntington* did not exhibit this charge, in the account presented at the time of the settlement, the release applies to those articles only, which are mentioned in the account. It has been decided, that even a



judgment in an action of *assumpsit* will not be a bar to a claim, which might have been given in evidence, if the claim was not actually made. *Seddon v. Tutop*, 6 Term Rep. 607.

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3. But the promise stated in this declaration must now be taken as an express promise. *Atkins v. Hill, Cowp.* 284. *Alexandria Ins. Co. v. Young*, 1 Cranch, 341.

[Mr. Daggett was informed from the bench, that this point had been too often settled, to need support.]

It is said, there is no request stated on the part of the defendant; but it is alleged to have been done *for his use and benefit*. The plaintiff, therefore, has suffered *an injury*, for the *benefit* of the defendant; and a consideration may arise either by an act done by one party for the benefit of the other, or by doing, or permitting somewhat to be done, to the prejudice or loss of one of the parties. *Pow. on Cont.* 342. 344. The consideration here stated would have been a good one, had the claim been barred by the statute of limitations; for an equitable, as well as legal obligation, is a sufficient consideration for a promise. *Hawker v. Saunders, Cowp.* 290. And a mistake in a settlement would be a sufficient consideration to support a promise, although the fact of a mistake might not be sufficient to imply a promise.

*Bradley*, for the defendant.

1. There is no consideration for the promise. The declaration does not state that the defendant employed the plaintiff to do this service, or that he knew that it was done, until years afterwards. The plaintiff has done an injury for which an action would lie against him; and the act can, therefore, form no good consider-

June, 1809.      ation for a promise. Were it a benefit to the plaintiff,  
 HUNTING-      it must have been done at *his request*, or no action would  
 TON      lie. And a subsequent promise will not aid it, because  
 v      the consideration is *past*.  
 TOPP.

It may be said, the promise may have been *in writing*; but if this is to supply the want of consideration, then it should be alleged in the declaration to have been in writing. The plaintiff must not only show that he may possibly have a cause of action, but it is indispensable that a good cause of action be particularly stated,

In cases under the statute of frauds, the plaintiff always states a sufficient consideration, and the defendant shows that it is not in writing. Here, it is neither shown that there was a good consideration, nor that the contract was in writing. But a written contract, without consideration, (unless under seal,) will not support an action. *Roberts on Frauds*, 8. *Rann v. Hughes*, 7 *Term Rep.* 350. *in notis*.

2. The facts in the plea show, that the plaintiff has no cause of action; at least, cannot maintain this action. The plea alleges, that the defendant employed the plaintiff as an attorney to draw those writs, and procure them to be served; when done, the defendant owed him for it, and owed him on book, because they were proper articles of book debt charge. When then the defendant settled and satisfied the plaintiff's book account, he settled these articles of book. This writing is a release of the account, and consequently of every article of account. *Brace v. Catlin*, 1 *Day*, 275. The statute of limitations of book accounts may be pleaded to any action other than book debt, brought after six years, which are proper subjects of book debt charge; and certainly a release of the whole account must be a release of each article


of it. It is, indeed, stated in the declaration, that at the time of the settlement, the plaintiff did not know of this charge by *Kent* to him. The plaintiff is to state his cause of action, but not anticipate the defence. This is an averment which cannot be traversed; it is an averment of a negative, and of what must be in the knowledge of the plaintiff only; an averment, therefore, which he could not make.

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If this is claimed as a mistake in a settlement, the plaintiff must resort to a special action on the case, and cannot maintain this action. *Hart v. Smith, Kirby*, 127. *State v. Lawrence*, 1 *Root*, 397.

BY THE COURT. The court cannot consider the promise laid in the declaration as dependent on implication of law, but it may be considered as an express, or even a written contract. If the consideration is sufficient to support an express written contract, the declaration is good. The plaintiff alleges the payment of money, which he became liable to pay on account of the defendant, and which it was the proper debt and duty of the defendant to pay. This is a good consideration for an express promise.

Judgment reversed.

 The court ordered the cause to be remanded to the superior court, and the rule of damages to be the costs paid in the two courts below, exclusive, however, of officers' fees upon the executions.



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JONAH RUTTY and ASA RUTTY *against* SIMON TYLER,  
2d, and LYMAN SHALER.

A grant of land to *A.* to continue for a yard to build vessels in, by *A.* and his heirs, so long as they shall see fit, but if they cease to use it for this purpose, not to be sold by them, but for ever to remain to *B.* and his heirs, gives *A.* no more than an estate for life, and the remainder to *B.* is good.

MOTION for a new trial.

This was an action of trespass, in which both parties claimed title under the same deed from *Joseph Arnold*, dated 15th of *April*, 1735; by which the grantor, for the consideration of love and good will, conveyed to his daughter *Anna Tyler*, and her husband, *Nathaniel Tyler*, a piece of land, containing an acre and three roods, and then proceeded thus: "I, the said *Joseph Arnold*, conditionally give, grant, and convey unto the said *Nathaniel Tyler* near half an acre by the great river side, where said *Tyler* built the brig the summer last past; said yard being set out with stakes and stones at each corner; which said small piece of land shall continue for a yard to build vessels in, by said *Nathaniel Tyler*, and his heirs, so long as he, or any of them, shall see good; but if said *Tyler*, or his heirs, shall cease building thereon, then said yard shall neither by him, nor any of them, be sold, but shall be and for ever remain to my son *Simon Arnold*, and his heirs and assigns: This last piece, with the conditions, to have and to hold to *Anna* and *Nathaniel Tyler*, their heirs and assigns for ever, as part of their portion." The plaintiffs claimed the last-mentioned piece of land under *Simon Arnold*; the defendants, under *Nathaniel Tyler*. They claimed, that the deed from *Joseph Arnold* vested an immediate estate in fee-simple, or fee-tail, in *Nathaniel Tyler*; and that, in either case, the contingencies were too remote and uncertain, and the condition was void. But the court directed the jury, that this was a limitation in law; and that the defendants must prove, that the conditions had been complied

with, and that they had not, by ceasing to build vessels, forfeited their estate. The defendants, after a verdict for the plaintiffs, moved for a new trial, for this supposed misdirection of the court.

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*Hosmer and Clark*, in support of the motion, contended, that a fee vested in *Nathaniel Tyler* by the grant; and, consequently, that *Simon Arnold* could take nothing. *Cro. Eliz.* 360. 379. *Pow. on Dev.* 239. *Co. Litt.* 18. *Edward Seymor's case*, 10 *Co.* 95. *Shelly's case*, 1 *Co.* 88.

*Daggett*, contra, argued, that a life estate only was given to *Nathaniel Tyler*; that the word "heirs" does not always convey a fee, but is sometimes used as *descriptio personæ*.

BY THE COURT.

The deed of *Joseph Arnold* conveyed nothing in the lands now in dispute to *Nathaniel Tyler*, but an estate for life; and this, on condition that the grantee, and his heirs, should use the land for a ship-yard. The word "heirs," as used in that part of the deed, is only descriptive of the person for whose use the estate is conveyed, and cannot enlarge the estate. The remainder, therefore, in fee, to *Simon Arnold*, was well created; and the rights of the plaintiffs, who claim under *Simon*, were correctly stated in the charge to the jury.

New trial not to be granted.

June, 1809.

EZEKIEL WOODFORD against MICAH WEBSTER.

If a plaintiff  
sues or pleads  
by conserva-  
tor, and the  
record is in  
usual form,  
and judgment  
in his favour,  
it will be  
good; and  
those words  
will be reject-  
ed as superfluous.

WRIT of error.

*Webster* brought an action of ejectment against *Woodford*; and the form of the writ was "to answer unto *Micah Webster, who sues by David Grant, his conservator.*" The defendant pleaded the general issue, and put himself on the country. "And the plaintiff likewise, by *David Grant, his conservator.*" The verdict was for the plaintiff; and the record of the judgment was in common form, that *the plaintiff* recover seisin, &c.

*Woodford* now claims, that the writ, pleadings and judgment are in the name of *David Grant*, and that it does not appear that *Webster* was in court.

*Daggett* and *Dwight*, for the plaintiff in error.

By this record it appears, that the suit has been prosecuted by a man not an officer of the court, claiming no authority to prosecute but as conservator of *Webster*. Our statutes authorize the county court to appoint and empower some meet person a conservator to take care of and oversee idiots, distracted and impotent persons, and their estate for their support.<sup>(a)</sup> *David Grant* must derive his power as conservator from this statute. But this statute gives no authority to the conservator to sue; in this respect, it leaves the object of it with his common law rights. And upon the principles of the common law, an idiot cannot sue, or defend, or appear by guardian, *prochein amy*, or attorney, but must always appear in proper person. *Fitz. N. B.* 27. *Co. Litt.* 135. 15 *Vin.*

(a) *Stat. Conn.* tit. 88. c. 1. s. 4.



*Abr.* 134. A conservator in this state has the same powers that the committee appointed in *England* to superintend the estate of a lunatic have under the statute of 17 *Edw.* II. 3 *Bac. Abr.* 367. Yet a suit cannot be maintained in the name of such committee, but must be brought in the name of the lunatic. *Cook v. Danton*, 1 *Brownl.* 197. S. C. *Hob.* 215. *Darcie's case*, *Poph.* 141. *Drury v. Fitch*, *Hut.* 16. *Higmore*, 118. 123. 11 *Ves. jun.* 397. The case of *Snow v. Antrim*, *Kirby*, 174. if it proves any thing, proves that a conservator cannot sue; for if he were a party, the notice given in that case would not have been sufficient. In *Ruth Butler's case*, 1 *Root*, 426. nothing was determined, except that the selectmen could not appoint an overseer to an insane person. And whatever may be the practice in chancery, it cannot regulate the *process* at law.

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WOODFORD  
V.  
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It is said, that the record shows, that the parties appeared. But the pleadings are part of the record; the manner in which they appeared is, therefore, before the court; and if it is an appearance not known to our law, the court must consider it as *no appearance*. And when there is a defect in instituting a suit, or no appearance by the party in whose favour judgment is rendered, it must, at any time, be set aside.

It is also said, that in certain cases, an idiot may appear by guardian, or attorney; and that by our practice, there is no inquiry as to the authority of a person signing a plea. It is a sufficient answer to the first of these remarks, that in this case, the party neither appeared by guardian, nor attorney; and as to the latter, it applies only to pleas signed by an officer of the court, which *David Grant* does not claim to be.

Again, it is said, that the words which show he did not sue *in propria persona* may be rejected as surplusage.

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 ———  
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But if by these words the relation of the parties to the case is changed, they cannot be treated as mere surplusage. In consequence of them, *David Grant* could not be a witness in the cause; but his declarations might be given in evidence against the claim of the plaintiff, and he himself become liable to both. *James v. Hatfield*, 1 *Stra.* 548. *Turner v. Turner*, 2 *Stra.* 708. *Hopkins v. Neale*, 2 *Stra.* 1026.

*E. Perkins*, for the defendant in error.

It does not appear, upon this declaration, that *Mical Webster* was an idiot, or lunatic; nor can it be necessarily inferred from any thing stated. His suing, therefore, by conservator, may be rejected as surplusage; especially as the record of the judgment is in the usual form, that the parties appeared.

But if the fact of his incapacity did appear upon the declaration, he ought to appear by conservator. The statute impliedly gives them this power. It imposes the duties of guardians, and means to give the powers. Indeed, the meaning of the terms guardian and conservator are nearly the same; one is of *Saxon*, the other of *Latin* origin. Conservators, like guardians, are appointed to take care of and oversee idiots, &c. and their estates for their support. To manage the estate, they must have the power of suing and defending; and the diction of the statute is comprehensive, and the decisions recognise this power. In *Snow v. Antrim*, *Kirby*, 174. the defendant being a lunatic, the court directed a continuance to cite in the conservator. And in *Ruth Butler's* case, her petition was dismissed because brought by an overseer, when she should have had a conservator. 1 *Root*, 426. And in chancery, idiots sue by their committee; 1 *Harri-son*, 763. and aged persons defend by guardian. *Hinde*, 4. 146. And at law, the rule that idiots must appear in

their own persons, does not extend to all who may have conservators; for he who is not an idiot *à nativitate*, but becomes *non compos mentis*, shall appear by guardian if within age, and by attorney if of full age. *Beverly's case*, 4 Co. 124. And by our practice, lunatics may appear by attorney. 1 *Swift's Syst.* 358.

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There is a difference in the form of declaring in *England*, and in this state. There, *A. B.* sues, or pleads, by his attorney *C. D.* Here, the parties plead by persons not stated to be their attorneys. The authority is not stated; but the expression implies an authority; and a person may have this authority, although he calls himself conservator.

But, if there was not an appearance strictly regular, the defendant could take advantage of it by plea in abatement only; and cannot assign that for error which he could have taken advantage of by plea in abatement. Thus, if a *feme covert* brings an action in her own name by attorney, and the defendant pleads in bar, he shall never assign the coverture for error. *Carth.* 124. 2 *Bac. Abr.* tit. *Error*. And if judgment be rendered against a person under an incapacity, as an infant, who did not appear in a proper manner as by guardian, he may take advantage of this on error; but if the judgment is in his favour, the *adverse party* cannot procure a reversal upon writ of error for such cause.

BY THE COURT. Nothing appears from this record, that *Micah Webster*, the plaintiff below, was under any disability whatever: his appearance is recorded in the usual form. His stating in the writ, therefore, that he sues by a conservator, may be rejected as surplusage.

Judgment affirmed.



June, 1809.

DAVID BOSTWICK, jun. *against* WILLIAM LEACH.

MOTION for a new trial.

This was an action of *assumpsit*.

A contract for the sale of things annexed to the freehold, but which are capable of separation without violence, and by the terms of the contract are to be separated, is not within the statute of frauds and perjuries.

Nor is an agreement not to exercise a right regarding the freehold, as to use a mill, or to carry on a trade in a particular shop, within the statute.

The statute contemplates a transfer of lands, or some interest in them.

The declaration stated, that the plaintiff was the owner of a grist-mill; and the defendant, having it in contemplation to build one within a short distance, and being desirous of procuring materials for it, as well as of securing to it, when built, the custom of such persons as usually went for grinding to the plaintiff's mill, proposed to the plaintiff that he should stop his mill on the first day of *January* then next, and the defendant would purchase the mill-stones, running geers, bolt, tackling, tools and utensils, which belonged to and were removable from the mill, and would pay the plaintiff for the same the sum of four hundred dollars. To this proposition the plaintiff acceded, and had performed every thing to be done on his part.

The defendant pleaded the general issue.

On the trial, the plaintiff offered to prove his case by parol evidence. It was agreed, that the plaintiff's mill was what is commonly called a *gig mill*, standing on a small stream of water; that the mill-stones were laid in the mill for the purpose of grinding in the same manner as mill-stones are usually placed in such mills for that purpose, *viz.* by the bed stones being laid upon the floor timber of the mill; that the running geers consisted of a horizontal water-wheel, the shaft of which was upright, which passed through the lower mill-stone for the purpose of turning the upper mill-stone; that the lower part of the shaft rested and turned on a pivot at the bottom;

and that the wheel was turned by the water being received in the usual manner of mill wheels of that description. It was also agreed, that the mill-stones, running geers, &c. were, at the time of the contract, in actual use for the purpose of grinding, and have never since been removed, but might be removed without doing violence to the mill-house, and without even so much as the drawing of a nail. It was further admitted that the plaintiff stopped his mill on the first day of *January*, according to his agreement, and the next day gave notice thereof to the defendant.

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The defendant objected to the admission of the evidence offered, on the ground that the contract set forth in the declaration, and offered to be proved, was a contract for the sale of lands, tenements, or hereditaments, or some interest in or concerning them; and not being in writing, was, therefore, within the statute of frauds and perjuries. But the court overruled the objection, and admitted the evidence.

A verdict being found for the plaintiff, the defendant moved for a new trial.

*N. Smith* and *Hatch*, in support of the motion.

The general question in this case is, whether the contract set forth in the plaintiff's declaration can be proved by parol? We object, that it is such a one as is required, by the statute of frauds and perjuries, to be in writing. The clause of the statute relied on is that which relates to the "*sale of lands*," &c.

1. The first inquiry is, whether any of the several articles of property, at the date of the agreement, were of such a nature as to be comprehended by the words of the statute? On this point it is hardly possible to

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conceive that a doubt should have been entertained. As to a part of them, they were annexed to the freehold, and would pass by a deed conveying the land. 2 *Bl. Com.* 17, 18. They would descend to the heir, and not to the personal representative, and might be set off to a widow as dower. *Co. Litt.* 32. a. 2 *Bl. Com.* 139. They are the subject matter of waste. In the case of *The City of London v. Greyne*, *Cro. Jac.* 182. it was determined, that it is waste to convert a corn-mill into a fulling-mill, although the conversion be for the lessor's advantage. At the date of the agreement, they would not have passed by a will, unless it had been duly executed to pass lands; nor could they have been the subject matter of felony; or have been taken and sold, on execution, as personal property. Indeed, a case can hardly be imagined, in which things of this kind, annexed to the freehold, are not treated, and considered as a part of the land. It is a correct rule, that where legal phrases occur in a statute, they are to be considered according to their acceptance at common law. If this rule be received, and applied in the construction of the statute of frauds and perjuries, it must terminate this part of our inquiries.

But we shall be told, that the mill-stones, bolt, and running geers, though annexed to the freehold, might have been dissevered from it; and thus converted into personal chattels; that they were sold with a view to a severance, and, therefore, that the sale is not within the statute. These positions require examination.

A contract derives its obligation from the assent of the parties legally expressed or evidenced; and, of course, must be obligatory, if at all, at the time it is made. It would seem, therefore, as if it must have respect to the nature and condition of the property which is the subject matter of it at that time; and that, if not binding then,



it can never become so by reason of any change in the property. June, 1809.

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The only case, which can be found, to support a contrary doctrine is that of an anonymous case in 1 Ld. Raym. 182. in which it is said to have been ruled, that a sale of standing timber is not within the statute. This, however, was merely the decision of a single judge (*Treby*, Ch. J.) at *nisi prius*, and is very loosely reported. It would therefore hardly be entitled to much respect, as an authority, even if it stood uncontradicted. But it has been directly overruled. The case of *Crosby v. Wadsworth*, 6 East, 602. where the same question came to be very fully considered, was solemnly decided the other way. This determination is justly treated by several late writers, as settling the point in debate. 1 Comyn on Cont. 76, 77. *Prake's Ev.* 214. Even *Roberts*, who in the body of his treatise on the *English* statute intimated an opinion in favour of the rule as laid down by Chief Justice *Treby*, has, since the decision in *Crosby v. Wadsworth*, retracted that opinion, and acknowledged that it was ventured, at first, on a slender foundation. [*Rob. Stat. Frauds*, p 15. of *Advertisement*; *contra*, p. 126.] The only difference between these two cases is, that in the former the contract was for the sale of standing timber; in the latter, of standing grass. The question in each was the same, and the same as that in the principal case: for it is agreed to make no difference, if the chattel be annexed to the freehold, whether it be the growth of the soil, as grass and timber trees. or the product of skill and labour, as a corn-mill and a mansion-house. As the law, upon this point, has been so recently, and so authoritatively settled in *Great Britain*, it should not be expected that this court will be misled by the exploded error of Chief Justice *Treby*.

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It may be added, that if any of the several articles, which were the subject matters of this agreement, are comprehended by the words of the statute; the agreement should have been in writing. For it is well settled, that if part of an entire contract be within the statute, it cannot be proved by parol. The case of *Chater v. Beckett* is conclusive on this point. [7 Term Rep. 201. *Sugden* 64. *Roberts on Frauds*, p. 111.]

It may be claimed, in the next place, that this agreement is excepted from the operation of the statute, by reason of a part execution. On this point, it is understood, that the opinion of the judges at the circuit principally turned.

[SMITH, J. That circumstance is perfectly immaterial here. Decisions upon questions of evidence, at the circuits, are necessarily made with so much haste, and so little consideration, that they can hardly be viewed as authorities in any case.]

It is not mentioned here, with a view to repel the authority of the decision; but simply to explain the reason why this point is dwelt on by us.

This general principle has been settled and applied in cases of this nature, that statutes, made to prevent fraud, should not be so construed as to encourage and protect it. But this is the only ground on which parol agreements performed, or in part performed, have been holden to be saved from the operation of the statute. A writer of much respectability does, indeed, seem to recognise other exceptions. He seems to suppose, that those cases are excepted, where the part performance is such as to furnish evidence of the agreement; and this on the broad principle, that such performance removes the danger of perjury. But this doctrine is exploded

by the whole current of opinions and authorities of a later date. *Per* Lord Alvanley, in *Foster v. Hale*, 3 *Ves. jun.* 713.; *per* Master of the Rolls, in *Buckmaster v. Harrup*, 7 *Ves. jun.* 341. *Rob. on Stat. of Frauds*, p. 134. 138. And even the cases which this writer puts by way of illustration, do, by no means, authorize his conclusion. *Pow. on Cont.* 292, 293. 309.

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From this principle, thus limited, it results, that courts will interfere to enforce a parol agreement, on the ground of part execution, in those cases only where some act is done in pursuance of such agreement, which is advantageous to the party claiming to rescind, or disadvantageous to the party performing. But it is to be noted, that in each case the act must be performed with the assent, express or implied, of the party, against whom a remedy is sought; otherwise, no fraud can be imputed to him, except such a fraud as every man may be supposed to practise, who denies his contract. But it is only the fraud, which seeks, by indirect means, to obtain the benefits of a promise, and yet denies its obligation, which the doctrine of part performance respects. If extended farther than this, the doctrine would, in effect, be equivalent to a repeal of the statute.

These distinctions, it is believed, are clearly traced, and well established, in the books.

Thus it is holden, that the payment of money is a sufficient part performance; but not if it be paid as earnest. It must be a part of the purchase-money; and, as Lord Loughborough once held, a *material part*. *Main v. Milburn*, 4 *Ves. jun.* It should be added, that this rule itself has recently been denied by Lord Redesdale. *Clinan v. Cooke*, 1 *Sch. & Lef.* 22.



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parol agreement, is in many cases a sufficient part execution; but the bare act of holding over by the tenant has not, it seems, been so considered; [3 *Ves. jun.* 378. *per Lord Chancellor*, in *Wills v. Stradling*;] nor has continuance in possession by lessee, in case of an agreement, by parol, to take a lease for a term of years certain. [1 *Pow. on Cont.* 309.]

It is said, too, that acts merely preparatory or ancillary to a contract, are not a part performance within the rule. *Roberts*, 139, 140.

Acts of ownership exercised, improvements made, and expenses incurred, under an encouragement express or implied, are holden sufficient to take an agreement out of the statute; but not, it would seem, if these acts are done merely upon the faith of the agreement, and not in pursuance of any stipulation in it. *Roberts*, 134, 135.

These rules, with their qualifications, go to show the extent of the doctrine in view; and warrant the inference, that wherever the acts relied on as a part execution are done upon the bare faith of a parol agreement, the case comes within the statute.

In further illustration of this point, it may be remarked, that in all cases of such agreements, there may be a countermand and refusal, on either part, and performance afterwards, on the other, does not avail. 1 *Comyn on Cont.* 78, 79. This point was expressly determined in the case of *Crosby v. Wadsworth*.

The case of *Lamas v. Bayly*, 2 *Vern.* 627. goes the full length of establishing the proposition for which we contend. There the performance was without the assent of the party claiming to rescind; and the case was adjudged to be within the statute. It had this other

feature, in which it strongly resembles the case at bar, that the performance relied on was a mere act of forbearance. This case is recognised as sound law, by a late writer, of considerable reputation, who asserts it as a general rule, that "merely abstaining from doing an act" is not a sufficient part execution. *Newland on Cont.* 195, 196.

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In the principal case, the facts connected with the point in debate are these : The agreement was to have been performed on the first day of *January* next after it was entered into. On that day, as the plaintiff avers, he stopped his mill; and, on the next day, gave notice to the defendant, who thereupon refused performance. According to a familiar rule of construction, this averment would be fully satisfied, if we should admit, that a mere point of time intervened between the cessation to use by the plaintiff, and the refusal by the defendant. Besides, it does not appear, that the forbearance to use, for any space of time, was a thing known, or assented to, by the defendant; but it does appear, that at the earliest period at which the law required his dissent to be expressed, he refused to ratify the contract. Prior to the notice and refusal, every act of performance must have been done on the faith of the agreement; after that, they must have been done not only without the defendant's assent, but with full notice of his dissent to their being done. A performance, under such circumstances, surely cannot be availing.

*Allen* was to have argued against the motion; but, owing to a sudden indisposition, was not in court when the cause came on.

*Bacon* submitted a few remarks in support of these propositions :

1. That this action was founded upon a promise of the defendant to pay 400 dollars, made upon a sufficient and

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unexceptionable consideration, *viz.* the plaintiff's stopping his mill. If this had been the only consideration, there could not have been a doubt in the case. Is the party less to be made liable on the same promise, because he was, in point of fact, compensated by other advantages, which the law will not take notice of.

2. That the articles, which the defendant contracted for, were not so annexed to the freehold, but that they might be sold separately as personal property. They were, indeed, contemplated by the parties as severed at the time of the contract. 1 *Ld. Raym.* 182. *Bull. N. P.* 282. *Poulter v. Killingbeck*, 1 *Bos. & Pull.* 398.

BY THE COURT. The contract was not embraced by the statute of frauds and perjuries. When there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute. Such are the contracts for the purchase of gravel, stones, timber trees, and the boards and brick of houses to be pulled down and carried away.

The agreement not to use his mill, after a certain day, is not within the statute of frauds and perjuries; for this statute contemplates only a transfer of lands, or some interest in them. In this case, there was no transfer of any right, but only an agreement not to exercise a right. He parts with no interest to any person. There is no conveyance of the stream, or indeed of any interest whatever. Thus, it differs nothing in principle from the case where a man has carried on a trade in his house, or shop, and agrees, for a valuable consideration, not to carry on his business at that particular stand: and yet such contract has never been held to be within the statute.

New trial not to be granted.



## A SUPPLEMENT,

CONTAINING A FEW DECISIONS OF THE SUPERIOR  
COURT ON THE CIRCUIT.

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*Notes of these cases were taken, because they were deemed of some importance at the time; and they are now published, because they have since been often cited, but have seldom been stated fully and correctly.*

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SIMEON PEASE *against* GIDEON BURT and others.

November,  
1806.

THIS was an action of false imprisonment.

The declaration charged that the defendants forcibly arrested the plaintiff in *Enfield*, in *Connecticut*, and carried him to *Northampton*, in *Massachusetts*, and there confined him in prison.

The right of bail to arrest and confine the person of his principal, is transitory, and may be exercised wherever the latter may be found. *Semb.*

The defendants pleaded *not guilty*; and rested their defence on two grounds: First, that they did not commit the acts charged; and, secondly, that they were justified in so doing, as they acted under the direction of the plaintiff's bail, and took the plaintiff for the purpose of surrendering him to the officer in *Northampton*, who had the execution; and that no more force was used than was necessary for that purpose.

But if the bail, in arresting his principal, makes use of more force than is necessary for the purpose, he will be liable for false imprisonment.

The arrest and imprisonment were clearly proved; and the second ground of defence was principally relied on.

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It appeared in evidence, that one *McGregory* had been bail for the plaintiff in a suit before the court of common pleas in the county of *Hampshire*, in *Massachusetts*; that judgment had been rendered against the plaintiff, execution taken out, and put into the hands of an officer for collection; that the plaintiff had absconded into *Connecticut*; that *McGregory* had pursued him thither; and that, by his direction, the defendants had arrested him there, carried him back, and surrendered him to the officer having the execution.

*N. Terry* and *H. Terry* contended that the plaintiff was entitled to a verdict, as the facts stated were proved, and no sufficient defence had been made out. They admitted the right of the bail to take his principal wherever he could find him *within the jurisdiction*; but insisted, that this right could not be extended further. They cited *Stoyel's* case, before the circuit court of the *United States*, in which Judge *Paterson* presided, as having settled the point in their favour.

*Goodrich* and *Bradley*, for the defendants. The bail, by virtue of the relation between him and his principal, has a right to the custody of the latter, and may, at any time, confine him.(a)

If the principal be taken away, by impressment, into the naval service; or by enlisting as a soldier; or even by criminal process; the bail may have the aid of a *habeas corpus* to bring him in to be surrendered.(b)

If then, *McGregory* had been bail for the plaintiff in the state of *Connecticut*, and had taken him in the man-

(a) 3 *Bla. Com.* 290. 2 *Hawk. P. C. c.* 15. s. 3. *Anon.* 6 *Mod.* 231.

(b) *Bail of Boise and Sellers*, 1 *Stra.* 641. *Bail of Peter Vergen*, 2 *Stra.* 1217. *Bond v. Isaac*, 1 *Burr.* 339. *Howard v. Lyon*, 1 *Roof*, 107.

ner he did for the purpose of surrendering him; or if, as the case stands, he had taken the plaintiff in the manner he did, within the jurisdiction of *Massachusetts*, and had not come into *Connecticut* for him; all would have been well.

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But we contend, that if the bail had a right to take his principal in *Massachusetts*, he had the same right in *Connecticut*.

It is said, that *process* is local, and necessarily confined to the jurisdiction, under the authority of which it issues. This we admit; but it does not follow, that the right of the bail to control the person of his principal, though such right may have derived its existence from process, is subject to the same restrictions.

The rights of bail are twofold: First, that of controlling the person of the principal, for the purpose of surrendering him; and, secondly, in case the bail does not surrender him, and pays the debt, that of an indemnity from the principal. The law imposes correspondent obligations on the principal, and supposes, that he acquiesces therein. These rights are neither of them local, but transitory.

In a suit brought by bail, in a different jurisdiction, against his principal, upon the implied promise of indemnity, would it be any defence to say that the original process, in which you were bail, would not extend here? But upon principles of reason and law, it would be as good an answer in that case, as it is to the claim of the bail to control and confine the person of the principal in a foreign jurisdiction, for the purpose of surrendering him.

There is a substantial distinction with respect to rights. Some are local; and some are transitory.



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V.  
BURT.

All crimes must be tried within the jurisdiction of the government, against the authority of which they were committed. The right of real property is local, and must be decided in that jurisdiction wherein it is situated; because process to give possession cannot come from a foreign jurisdiction. But all rights of a personal nature are transitory. A right to personal property; a right to a personal action, whether founded on a contract, or on tort; or a right in one to control the person of another, acquired under the laws of one government, extend to, and may be exercised, and enforced in, any other civilized country, where the parties happen to be. Goods purchased in *London* are the property of the purchaser when transported to *New-York*. A contract made in *Europe*, or in *India*, may be enforced in this country. Trover and trespass will lie here for injuries done to things personal in any part of the world.(a)

If a right to personal property, and a right of action, acquired under the laws of one country, exist, and may be enforced, in another; then a right acquired by one to control the person of another is likewise transitory: For these cases are strictly analogous in this respect, and depend upon the same principles.

An enumeration of the cases, in which one may have a right to control the person of another, will put this question beyond a doubt. A parent, guardian, and master, have this right; and upon removal from one state, or country, to another, would they not respectively continue to have the right to control and govern their children, wards, or apprentices? Poor children may be bound out by the civil authority and selectmen of a town; poor debtors may be assigned in service, under certain cir-

(a) *Rafael v. Verelst*, 2 *Bla. Rep.* 1055. *Mostyn v. Fabrigas*, *Cowp.* 170—182.

cumstances, to pay their debts; criminals also may be assigned in service, in certain cases, by the court before which the trial is had, to pay the costs of prosecution; and criminals confined in *Newgate* prison, after their term of confinement is expired, may, if they cannot otherwise pay the cost, be assigned for that purpose. Suppose any of these persons should escape from their masters, and go into the state of *Massachusetts*; might they not be followed, and reclaimed? Even a slave, having fled from his master, in a country where slavery is tolerated, into another where it is by law prohibited to its own citizens, may be taken up, and carried back by the mere authority of the master.(a)

Nov. 1806.  
WELLS  
V.  
TRYON.

THE COURT, in summing up to the jury, avoided a direct decision of the point of law raised in this case, though they intimated an opinion in favour of the defendants.(b) But as there was some evidence that the defendants, in making the arrest, were guilty of unnecessary violence, the court directed the jury, if they believed that was the case, to find for the plaintiff; which they accordingly did.

(a) 1 *Bla. Com.* 451.

(b) The court, at this time, had not adopted the practice of giving, in their charge to the jury, an explicit opinion on all the points of law in the case.

SAMUEL WELLS *et al.* against JOSEPH TRYON *et al.* Nov. 1806.

THIS was an action of ejectment. The defendants pleaded, severally, *no wrong or disseisin*; and issue was closed to the jury.

A copy of a certificate of survey, signed *A. B. Surveyor*, and *C. D.* and *E. F. Committee*, and certified to be a true copy by *G. H. Register*, is not admissible in evidence, in an action of ejectment, to prove the plaintiff's title.

Nov. 1806.

WELLS  
V.  
TRYON.

*Brace*, for the plaintiffs, to prove their title, offered in evidence a writing, purporting to be a copy of a certificate of survey, signed "*Thomas Wells, Surveyor*," and "*Thomas Hollister and Jonathan Hale, Committee*." It was certified to be a true copy of record by "*Josiah Hale, Register*."

*E. Perkins* and *Z. H. Smith*, for the defendants, objected to the admission of this paper in evidence to the jury. The statute of 1723(a) authorized the proprietors of common or undivided lands to hold meetings, to choose their clerk, and to keep records. But the paper offered does not appear to be a copy of any record of the proprietors, nor to be certified by their clerk.

The counsel for the plaintiffs remarked, in reply, that there is *now* no such body of men as the "proprietors of common and undivided lands." They may have transferred their rights to the towns; and if so, the town registrar is the proper officer to certify the copy.

BY THE COURT. The certificate offered is a proper subject of the proprietors. The town could not make the survey. But it does not appear by whom the survey was made, or recorded; or by a registrar of what body the copy was certified. It is not proper to send a paper to the jury under so much uncertainty. It is, therefore, inadmissible.

(a) Entitled "*An act for the better establishing and confirmation of the titles of land anciently obtained in townships, according to the manner or custom heretofore used; and for preventing contentions about the same.*" Tit. 97. c. 10.



Feb. 1807.

THE PRESIDENT, DIRECTORS, and COMPANY of HARTFORD BANK against WILLIAM HART.

THE plaintiffs declared against the defendant as the endorser of a promissory note executed by *Joseph Hart*. The general issue was pleaded, and closed to the jury.

The note being produced on the trial, it purported to be made and endorsed as stated in the declaration. The defence, set up by the defendant, was, that the endorsement was a forgery. The plaintiffs admitted that it was not the hand-writing of the defendant, but contended, that he had virtually authorized it, and made it his own.

*Daggett, Perkins, Mosely and Root*, for the plaintiffs.

*Ingersoll, Goodrich, R. Griswold and N. Terry*, for the defendant.

After the jury were called, *Ingersoll* objected to *S. O.* as a juror, on the ground that he had married the sister of *W. W.* who was plaintiff in an action against the present defendant, before this court, and to be tried this term, depending upon the same principles as this case. The juror's wife, at the time of the trial, was dead.

A juror, who had married the sister of a party in another case depending on the same principles as the one on trial, excused from sitting though his wife was then dead.

*Daggett* insisted that this was not a sufficient ground of challenge. Besides, the connection, which once subsisted, is now dissolved.(a)

*SWIFT, J.* said it had never been determined in this

(a) Affinity, or alliance by marriage, is not, by the *English* law, a ground of principal challenge, unless it continue, or there be issue living. *Co. Litt.* 157. a. and note 278. by *Hargrave*. *Mounson v. West*, 1 *Leon.* 88.

Feb. 1807. state how far consanguinity, or connection by marriage, would disqualify a juror.(a) The courts have decided, however, that the *cousin* of a party cannot sit in the case.

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v.  
HART.

### THE COURT excused the juror.(b)

Putting a letter into the post-office is a fact, from which the jury may infer, that the person to whom it was addressed had notice of its contents.

On the trial, the counsel for the plaintiffs stated, that *Joseph Hart* had made use of the defendant's name on other notes which had been discounted at the bank, and that notice of this had been given to the defendant. To establish the fact of notice, they offered to prove, by the cashier, that he had put letters, addressed to the defendant, containing notice, into the post-office.

*Goodrich* objected to the evidence offered. The putting a package into the post-office is no evidence that it was delivered. Payment could not be proved, by proving that the money was put into the post-office. A demand of property could not be proved in this way. That in the case of bills of exchange and promissory notes, the putting a letter in the post-office is sufficient, not because that proves the notice, but because the party in doing that *has discharged his duty*. If it should appear that the letter had miscarried, it would not affect him.(c) It would be dangerous to establish the doctrine, that the putting a letter into the post-office is evidence of notice, because the letter may miscarry, and it would be impossible for the party to whom it was sent to prove that he did *not* receive it.

(a) By the *English* law, a juror, who is of kin to either party within the *ninth* degree, may be challenged *propter affectum*. 3 *Bla. Com.* 363. *Tidd's Prac.* 309.

(b) In *England*, and in some of the *United States*, challenges to the favour are decided by *triers*. 3 *Bla. Com.* 363. *Co. Litt.* 158. *Trial of Smith and Ogden*, 245, 246. in *New-York*. But in this state, all challenges of jurors are decided by the court. 2 *Swift's Syst.* 233.

(c) *Chitty*, 95.

*Daggett*, contra, insisted, that the objections to the testimony offered went rather to its *weight* than to its *competency*. Such is the establishment of the mails, that the putting a letter into the post-office affords a fair presumption, that it was received, and read, by the person to whom it was directed. If this were not evidence, it would, in all cases, be necessary to have a person at the office of delivery, capable of identifying the letter, to prove its reception. It is not according to the course of business to make *payments*, in money or goods, through the mail, without special directions. But *information* is regularly communicated in this way.

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V.  
HART.

THE COURT admitted the testimony.

SWIFT, Pr. J. said it was perfectly clear to his mind, that the putting a letter into the post-office is a *fact* from which the jury may *infer* notice.(a)

*Ingersoll* afterwards offered to prove that the names of other persons than the defendant had been forged, by *Joseph Hart*, on paper, which had been lodged at the bank, and had lain over; and that notices had been put into the post-office directed to them.

In an action by the endorsee of a promissory note against the defendant as endorser, on the ground that though the endorsement was a forgery, yet he had made it his own; and it having been proved, that his name had been forged on other notes

*Daggett* objected.

THE COURT ruled out the evidence. They said the point had been before determined.

discounted at the bank of which he had had notice, he cannot be permitted to prove, that the names of other persons had been forged under similar circumstances, of which they had had notice.

In the further progress of the trial, *Ingersoll* offered to prove, that the president and directors knew, when

The confessions of individual members of a corporation aggregate, a par-

(a) *Vide Parker v. Gordon*, 7 East, 385. *qu. con.*

ty to the suit, which were not made in the exercise of any corporate duty, cannot be received in evidence.



Feb. 1807. they discounted the note, that the endorsement was forged, and to prove this, by the *confessions* of the president and directors.

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v.  
HART.

*Daggett* objected to this evidence. Who is the party? An aggregate corporation; the creature of the law. The claim is, that individuals of this corporation may confess away its rights. A corporation can regularly do no act without writing.(a) The confessions of a judge of probate, in a suit on the bond, have been rejected, because he speaks only by his records. Are the confessions of a member of an incorporated town to be admitted?

*Ingersoll* and *Terry*, contra, admitted, that an individual of a corporation can do no corporate act. But the persons, whose confessions are offered, were the *agents* of the corporation; and these confessions were respecting acts *within their agency*. There can be no question but that such acts are *binding* upon the corporation.(b) If it could be proved that the president and directors discounted this paper, *knowing it to be forged*, by disinterested witnesses, or in any other way than by a note of the corporation, it can be proved by the confessions of those who did the business with such knowledge.(c) Suppose the agent of a town, confesses notice as to a pauper; may not such confession, in a suit against the town, be proved? Could not the payment of money to a town be proved by a receipt from the selectmen? If their receipt would be evidence, would not their ac-

(a) 4 Com. Dig. tit. *Franchises*, F. 13. *Harg. Co. Litt.* 94. b. note 99. 1 Bla. Com. 475. 6 Vin. Abr. 268. 287, 288. *Kyd on Corp.* 1. 256 268. 449, 450.

(b) *Vide Charter of Hartford Bank*, par. 10. Stat. p. 41.

(c) With regard to the question, how far the admissions of an agent may be received against his principal, see *Peuke's Ev.* 18. 2d Lond. edit. and the cases of *Biggs v. Lawrence*, 3 Term Rep. 454. and *Bauerman v. Radenius*, 7 Term Rep. 668. there cited.

knowledge be? The directors are precisely in the same situation as selectmen, with regard to the business which belongs to them. The agents, in this case, could not be witnesses; because they are a party.

Feb. 1807.

TERRY  
v  
CAPEN.

*Daggett*, in reply. This is not the case of notice given to an agent, which shall bind his principal. The president is the agent for certain purposes mentioned in the charter; but he is not agent *to confess*. Because a man cannot be a witness, it is by no means a *sequitur* that his confessions may be proved.

BY THE COURT. It is clear, that the doings of a corporation can be known only by its corporate acts. The confessions of individual members cannot be received. Though the directors have certain powers, resulting from their act of incorporation, and are, for certain purposes, agents; and though their acts, *when in strict relation to their agency*, are binding on the corporation; yet, as to the matters attempted to be proved, it does not appear that they were agents. The evidence is, therefore, inadmissible.(a)

(a) *Vide Head et al. v. Providence Insurance Company*, 2 Cranch, 127. *Beatty v. Marine Insurance Company*, 2 Johns. 114.

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NATHANIEL TERRY *against* JOSIAH CAPEN.

Feb. 1807.

TERRY, before the court, called upon *Edwards*, Under the rule for the defendant's counsel to say whether he had a defence in this case.

it is sufficient for the counsel to say, that his client has instructed him to defend, and he expects the case will be tried, unless previously settled.

Feb. 1857. *Edwards* said the defendant had instructed him to  
 BURNHAM make a defence.  
 v.  
 GOODWIN.

*Terry* insisted that the answer was insufficient; that the rule required him to say whether *he believed* his client had a defence, and moved that the defendant might be called.

BRAINERD, J. said he would ask *Edwards* whether he expected the case would be tried?

*Edwards* answered, yes; unless certain propositions for a settlement should be acceded to.

THE COURT refused to call the defendant, SWIFT, Per. J. remarking, that he never liked the rule, and would not extend it beyond its strict application.

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DAVID BURNHAM *against* LEVI GOODWIN and others.

A material amendment allowed, in a petition to redeem without costs. ON a petition to redeem mortgaged lands, *Edwards*, for the petitioner, moved a material amendment to the bill. The only question was as to the payment of costs.

THE COURT allowed the amendment without costs, on the ground, that the petitioner would be obliged to pay costs in either event of the suit. If the prayer of his petition should be granted, he must pay costs before he can redeem; if denied, costs will be taxed against him.



Feb. 1807.

HEZEKIAH HUNTINGTON, Esq. *et al.* against EBENEZER  
SHELDON *et al.*

THE declaration stated facts, from which the law would, perhaps, imply a promise; but no promise was alleged.

In what cases of amendment costs must be paid.

*Huntington* moved to amend the declaration by stating a promise.

The amendment being allowed, *Edwards*, for the defendants, claimed costs.

*Huntington* inquired, if the court required costs to be paid in all cases of amendment?

SWIFT, Pr. J. said the court required costs to be paid in almost all cases of amendment of the declaration, except for the increase of damages, for the correction of a clerical mistake, or for something of a like nature.

TRUMBULL, J. said where a declaration, which would be demurrable, is amended so as to be good, or where the amendment would change the defendant's defence, costs must be paid.

BY THE COURT. Let the amendment be made, upon payment of costs.

Feb. 1807.

RICHARD WILLIAMS *against* ERASTUS LEWIS.

A constructive possession in the plaintiff is sufficient to enable him to maintain trespass.

THIS was an action of trespass for a load of tin ware.

On the trial to the jury, it appeared, that the plaintiff had delivered the property, at *Hartford*, to one *Warner*, a tin pedlar, with an understanding between them, that the latter was to carry it to *Farmington*, there take in some other ware, and return to *Hartford*. The terms on which he was to take the load were then to be agreed upon. *Warner* neglected to go to *Farmington*, but went to a different place, and disposed of the property to the defendant. There was some evidence that the defendant had practised unfair means to obtain it.

*Goodrich* and *Edwards*, for the plaintiff.

*Moseley* and *Perkins*, for the defendant.

For the defendant it was contended, that the plaintiff could not maintain this action, as he was confessedly not in possession of the property at the time it was taken by the defendant.(a)

SWIFT, Pr. J. in summing up, said, the question of fact in this case was, whether there had been a *sale* of the property by the plaintiff to *Warner*, before it was disposed of to the defendant. If the plaintiff did not sell the property to *Warner*, the possession of *Warner* is to be considered as the possession of the plaintiff, and is sufficient to enable him to maintain the action.(b)

The jury found a verdict for the plaintiff, which was accepted.

(a) *Esp. Dig.* 383. *Dub.* edit. 1794. *Ward v. Macauley*, 4 *Term Rep.* 489.

(b) *Vide Smith v. Miles*, 1 *Term Rep.* 475.

Feb. 1807.

JOSEPH LYNDE *against* JAMES JUDD.ACTION of *assumpsit*.

On trial to the jury, *Dwight*, for the defendant, offered Mr. *Ingersoll* as a witness to prove a paper in his hands.

Mr *Ingersoll* himself objected to producing the paper.

An attorney cannot be compelled to produce in evidence a paper, which was left with him by a client in another case.

It appeared that the paper had been delivered to him, as counsel in another case by a client, with instructions not to make use of it in court.

BY THE COURT. Mr. *Ingersoll* cannot be compelled to exhibit it.

*Dwight* then offered a copy.

*Edwards*, contra, objected, on the ground, that it was evidence of an inferior nature.

BY THE COURT. The copy, after being proved, may be read.

The witness to prove the copy said, that the defendant read a paper as the original, and he, the witness, looked at the copy, and it agreed with the paper read to him.

Where an original paper is in the hands of an attorney under such circumstances that he cannot be compelled to produce it in evidence, the party may prove and exhibit a copy.

A copy may be proved, by comparing it with the original, as read by another person.

*Edwards* objected to the sufficiency of the proof, because it did not show that the paper read by the defendant was in fact the original; or, if it was, that the defendant read it correctly.

*Quere*, whether there ought not to be some evidence that the paper read as the original was in fact such.



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BOND  
v.  
KIBBE.

BY THE COURT. This is the usual mode of comparing papers. The proof is sufficient to entitle the party to read the copy.(a)

(a) Vide *M'Neil v. Pe chard*, 1 *Esp. Cas.* 263.

SOLOMON BOND *against* ELISHA KIBBE and SAMUEL ALLEN.

Before caution can be entered with the town-clerk, upon land conveyed by deed not acknowledged; the grantee must have required the grantor, and the grantor must have refused to acknowledge the deed. Caution having been duly entered, after such demand and refusal, the deed though unacknowledged, may be given in evidence in an action of ejectment.

THIS was an action of ejectment.

*Kibbe*, one of the defendants, died pending the suit, and before this term. On the trial, *Allen*, the surviving defendant, admitted himself to be in possession; and the only question was that of title.

*Daggett* and *H. Terry*, for the plaintiff.

*Terry* and *S. Terry*, for the defendant.

The plaintiff claimed under *Kibbe*, the deceased defendant; and, to prove title, offered in evidence a deed from *Kibbe*, dated *March 24*, 1804, but which was not acknowledged, nor recorded.

The defendants' counsel objected to the admission of this instrument in evidence, on the ground that it conveyed no title.

The plaintiff's counsel then produced a copy of a *caveat* from the town records, duly certified by the town clerk, dated *April 4*, 1804, by which the plaintiff cautioned all persons not to purchase the land in question, as he claimed it by virtue of a deed from *Kibbe*, not acknowledged. This *caveat* being read to the court,

The counsel for the defendant still objected to this deed's going to the jury, on the following grounds: Feb. 1807.

BOND  
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KIBBE.

1. That in order to render the caution effective, *Kibbe*, the grantor, must, before such caution was entered, have been required, by *Bond*, the grantee, to acknowledge the deed, and the grantor must have refused to acknowledge it. But no such *demand* and *refusal* having been proved, the deed rests on no better ground, as evidence of title, than it would, if no *caveat* had been entered.

2. If such demand and refusal had been proved, still the deed would not be evidence in *an action of ejectment*. The object of caution is merely to lay a foundation for *equitable* process, to compel the grantor or his heirs, to acknowledge the deed. The decree of the court ordering such acknowledgment to be made, being upon the town records, where the land lies, the title of the grantee would be completed, though the grantor should persist in refusing to acknowledge the deed.

3. If the deed, with the aid of caution duly entered, may be used as evidence of title in actions at law, yet it can be so used in actions between the grantor and grantee *only*; and therefore cannot be given in evidence, in this case, against the defendant, *Allen*, who was not a party to the deed.

BY THE COURT. The statute, which provides that *caution* may be entered, authorizes such proceeding only in cases where the grantor has been *required*, by the grantee, to acknowledge the deed, and the grantor has *refused*. In order, therefore, that *caution* may have any effect upon this deed, such demand and refusal must first be proved. That being done, the "caution shall secure the interest of the grantee until a legal trial hath

Feb. 1807. passed unto a final issue according to law."<sup>(a)</sup> The legal trial here spoken of must mean a *trial at law* upon the title; and therefore the deed may go to the jury in an action of *ejectment*. As to the question whether the deed may be given in evidence in this action, *against Allen*, the court are of opinion, that the caution having been duly entered, the interest in the grantee is secured; and consequently, the deed is good against a stranger.

BOND  
V.  
KIBBE.

The counsel for the plaintiff then offered to prove to the court, that *Kibbe*, the grantor, had said, that he would not acknowledge the deed.

To this evidence the defendants' counsel objected; because there must be an actual refusal upon demand made. *Kibbe* might have altered his determination, upon being required by *Bond* to acknowledge the deed.

BY THE COURT. The evidence offered is inadmissible. There must be proof that *Bond* required *Kibbe* to acknowledge the deed, and that *Kibbe*, upon being so required, refused to acknowledge it.

No such proof being offered, the court ordered the case to be called; and the plaintiff thereupon was

Nonsuited.

(a) *Vide* "An act concerning town clerk's office and duty," *par.* 4. p. 417. edit. 1796.

#### WILLIAM BRADLEY *against* JOHN CLARK.

A judgment, which answers the issue, and justice. The original action was book debt. The execution which execution was granted, will not be reversed, because it did not say, that the party should recover, and that execution should issue.



ral issue was pleaded, and found for the plaintiff. Judgment was entered up in these words: Feb. 1867.

RATHBONE  
v.  
RILEY.

"This court having considered the matter, and examined their books, and heard the witnesses, find, that the defendant is indebted to the plaintiff the sum of seven dollars debt, and his cost, taxed at two dollars and fifty-seven cents. Execution granted."

The errors assigned were,

1. That the court, has not rendered judgment that either of the parties should recover any thing of the other party.

2. That the court has not rendered judgment that execution should issue, but execution did issue.

The writ of error was read, and submitted, without argument.

#### THE COURT

Affirmed the judgment.(a)

(a) *Vide Clark v. Moses, Kirby, 144.*

SAMUEL RATHBONE and MOSES RATHBONE against  
JUSTUS RILEY.

THIS was an action of ejectment. The general issue was pleaded, and closed to the jury. *A.* having made a conveyance of land to *B.*, and *B.* to *C.*; and *D.*, a creditor of *A.*, having attached the premises, in a suit against *A.*, and caused a copy of the attachment to be left in the town clerk's office, before the conveyance from *B.* to *C.*; such copy is notice to *C.*, and to all the world, of *D.*'s claim to the premises.

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*Dwight and Z. H. Smith, for the plaintiffs.*

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*Goodrich and J. Williams, for the defendant.*

The plaintiffs claimed title to the demanded premises, by the levy of an execution, in their favour, against *Josiah Brooks*.

The defendant claimed a title derived from *Brooks*, by regular conveyances.

On the 2d of *December*, 1803, *Brooks* gave a deed of the land in question to *Nathaniel Tryon*, which was soon afterwards recorded. *Tryon* conveyed to the defendant, by a deed, which was executed, and recorded, on the 30th of *May*, 1804.

It appeared that the plaintiffs, on the 21st of *January*, 1804, attached the land, as the property of *Brooks*, in a suit against him, returnable to the *Hartford* city court. A copy of that attachment, with the officer's doings thereon, was duly left in the town clerk's office. Having obtained judgment against *Brooks*, the plaintiffs took out execution, and on the 18th of *May*, 1804, had the same levied on the land, which was immediately appraised, and set off to them. The execution, with the officer's return, was recorded by the town clerk, on the 23d of the same month, and by the clerk of the city court, on the 2d of *June*.

Evidence was introduced, by the plaintiffs, to show that the deed from *Brooks* to *Tryon* was fraudulent.

The counsel for the defendant contended, that *he* was a *bonâ fide* purchaser without notice of any fraud, and without notice of the plaintiffs' attachment; and that *his*

title, therefore, was valid. To this point *Lee v. Abbe*(a) Feb. 1807.  
was cited.

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V.  
RILEY.

The counsel for the plaintiffs insisted, that the copy of their attachment, left in the town clerk's office, was constructive notice to the defendant, and to all the world, of their claim against *Brooks*. And as to the doctrine established in *Lee v. Abbe*, they said, it did not apply to this case; because the plaintiffs' lien on the land accrued before the execution of the deed from *Tryon* to the defendant.

It was answered, contra, that the copy of an attachment against *Brooks*, in the town clerk's office, could not be constructive notice to the defendant, when he was about to take a conveyance from *Tryon*.

SWIFT, Pr. J. in summing up to the jury, said, that if they found the deed from *Brooks* to *Tryon* to be fraudulent, the copy of the attachment left in the town clerk's office, and the record of the execution, was constructive notice in law to the defendant, and to all the world, that the plaintiffs claimed the demanded premises; and that the levy of the execution by the plaintiffs vested in them a legal title thereto.

The jury found a verdict for the plaintiffs, which was accepted.

(a) 2 Root, 359.



Feb. 1807.

LEVI COLLINS, Assignee of the estate and effects of  
DANIEL SAMPSON and JAMES FOSTER, Bankrupts,  
against ELEAZER W. PHELPS.

*Indebitatus  
assumpsit* for  
money had  
and received  
*ad computan-  
dum* cannot be  
sustained, un-  
less the de-  
fendant ex-  
pressly pro-  
mise to pay a  
particular  
sum.

THIS was an action of *assumpsit*. The declaration was  
in substance as follows :

That the defendant on the 20th of *July* was justly and  
truly indebted to the plaintiff, as assignee of *Sampson*  
and *Foster*, in the sum of seven hundred dollars, for so  
much money before that time and since the bankruptcy  
had and received to and for the use of the plaintiff, as  
assignee; for that *Sampson* and *Foster* since their bank-  
ruptcy delivered to the defendant certain books of ac-  
counts, notes and receipts, in their favour, and authorized  
the defendant to receive the moneys due on the same to  
the use of the plaintiff, as assignee; that the defendant  
had received and collected seven hundred dollars, the  
avails and proceeds of said books, notes and receipts,  
for the use and benefit of the plaintiff, as assignee; that  
the defendant became liable to pay that sum to the  
plaintiff, and being so liable, assumed and promised, &c.

The general issue being pleaded, and the case being  
on trial to the jury,

*Goodrich*, for the defendant, objected to the admission  
of any evidence, under this declaration, on two grounds:

1. Because an action of account only can be sustained  
on these facts.(a)

(a) A case in *Salkeld* was mentioned from the bench as applicable to  
this point. *Poulter v. Cornwall*, 1 *Salk.* 9, was probably the case al-  
luded to. That was an action of *indebitatus assumpsit* for money had

2. Because the declaration contains no sufficient description of the property. It is so loose that we cannot be compelled to answer to it.

Feb. 1807.

COLLINS  
v.  
PHELPS.

*Edwards*, for the plaintiff.

1. We have not described the defendant as an attorney, nor averred that the moneys were received by him in that capacity. That we may have another action is no reason why we may not maintain this. For the sums collected on book, however, we must bring *assumpsit*; we cannot bring trover. Nor, indeed, can we bring account; for the defendant was never *our* bailiff and receiver.

2. We cannot particularly describe the notes and accounts. We expect to prove that the defendant has received a specific sum, which he has not paid over.

BRAINERD, J. The question is, whether, from the facts disclosed in the declaration, it appears that an ac-

and received *ad computandum*. On a motion in arrest, after verdict, it was contended that that action did not lie, but account; for if a man receives money to a special purpose, as to account, or to merchandise, it is not to be demanded of the party as a duty, till he has neglected or refused to apply it according to the trust under which he received it. And the declaration must show a misapplication, or breach of trust. The court, however, held, that the verdict had aided the declaration; for, say they, it must be intended that there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor. This clearly implies, that the declaration would be ill on demurrer; and since the decision in *Rushton v. Aspinall*, Doug. 679. I apprehend it would be held to be so after verdict. As it was not stated in the declaration that the defendant had refused to account, or that he had done any act which rendered him an absolute debtor; and as these were not circumstances necessary to any of the facts charged; it was not requisite for the plaintiff to prove them, and, consequently, not to be presumed, from the verdict, that he had proved them.

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tion of account ought to be brought? These facts necessarily imply that the defendant has an interest; and the proper action is account.

TRUMBULL, J. This action is brought expressly for 700 dollars. If the defendant disclaims all charges, all hires; if he has had this sum clear of all claims, perhaps such evidence is admissible under this declaration.

SWIFT, Pr. J. I should think *assumpsit* in this case would lie; but the opinion of the court is, that you can prove nothing but an express promise.

The plaintiff's counsel then offered in evidence an endorsement made by the defendant on a note from *Samphson* and *Foster* to him in these words: "January, 11, 1803. Received in goods, book debts, and money, six hundred and thirty dollars in part of this note.

"E. W. Phelps."

This evidence being objected to,

THE COURT ruled it inadmissible.

The plaintiff, failing in any further proof, was

Nonsuited.

Feb. 1807.

SAMUEL PECK *against* DEODAT WOODBRIDGE.

A decree of chancery having been reversed, on the ground of fraud practised in obtaining it, and the party injured restored to his former situation; and an action at law having been brought to recover damages for the fraud; chancery will not interpose to grant an injunction against that action, on an application, by the opposite party, for that purpose.

THIS was a petition in chancery for an injunction against an action at law commenced by the respondent



against the petitioner, and which was still pending. The action at law had grown out of a previous controversy between the parties, the history of which was stated in the petition. It was substantially as follows:

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On the 1st of *June*, 1768, *Noah Rust* mortgaged a farm of land to *Jehiel Rose*, defeasible on the payment of a sum of money by the 1st of *April*, 1772. *Rose* entered into possession in *January*, 1770; and he, and those who held under him, continued in possession from that time until *February*, 1802. In *January*, 1771, *Rust* died insolvent. In *March*, 1782, his administrator brought a petition to redeem, and obtained a decree in his favour. He failed, however, to pay the mortgage money by the time limited in the decree. By a succession of regular conveyances from the mortgagee, the title to the premises became vested in *Woodbridge*, the present respondent. *Peck*, the present petitioner, had married the daughter and heir of the mortgagor; and in *September*, 1799, *Peck* and his wife brought a bill of review, praying for liberty to redeem, on the ground that she, at the time of her marriage, was a minor. The court decreed a redemption, and ordered *Woodbridge* to remove a store which he had erected in front of the premises. *Woodbridge* complied with the decree; but afterwards discovering that the evidence on which the decree had been obtained was false, and imposed on the court by the fraudulent conduct of *Peck*, he brought a bill of review. The court found the facts stated by *Woodbridge*, as the ground of application, to be true, and reversed the decree of redemption, on the terms, that each party should be restored to the condition he was in before that decree, and that *Woodbridge* should recover his costs in both suits. The rents and profits, while *Peck* was in possession, were, by agreement, set off against the interest of the money. After the execution of the decree last made, *Woodbridge* brought an action at law

Feb. 1807. against *Peck*, the *gravamen* of which was, that *Peck* had, by a deception practised upon the witness, imposed false evidence upon the court, and had, in consequence of the fraud, and the decree by that means obtained, put *Woodbridge* to great expense in defending against the petition, in removing his store, and in the interruption of his business. For an injunction against that action this petition was brought.

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To this petition there was a demurrer.

*Ingersoll* and *E. Perkins*, for the petitioner.

*Goodrich* and *Daggett*, for the respondent.

In support of the demurrer, it was argued,

1. That the same matters, which are stated as the ground of this application, may be pleaded to an action at law. If these matters would not make a sufficient defence at law, they will not be sufficient to warrant the interposition of a court of chancery. The former proceedings in chancery ought, no less than a judgment at law, to be pleaded by the party who would avail himself of them. If there has been a satisfaction, by the execution of the decree, it should be pleaded.

2. That the action at law is for matters which the decree could not reach. *Woodbridge's* bill was a bill of review upon new matter discovered, the objects of which were, to produce an examination and reversal of the decree made on the former bill, and also to put the petitioner into the situation in which he would have been, if that decree had not been executed. These are the proper, and the only proper objects of a bill of this nature.(a) But merely to reinstate the party in his former

(a) *Mit. Plead.* 78—81. *Hinde's Chan.* 56, 57.

situation would not afford him complete redress. The action at law is broader; it alleges matter extraneous to the bill; it demands a sum *in damages* for expenses incurred, and injuries sustained, in consequence of the fraud.

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3. That, at any rate, the court will not, on this petition, examine into, and decide upon, the merits of the action at law. A bill of review is already sufficiently complex.

Against the demurrer, it was argued,

1. That the plaintiff in the action at law has no merits. He could be entitled to but one satisfaction; (a) and *that* he has obtained by the execution of the decree. The general rule is, that a party may go to law for damages, or into chancery for specific relief. But after he has gone into chancery, he cannot, for the same cause, go to law. The relief is in lieu of damages. If he can get more at law than in chancery, he may go to law; but he must make his election. The redress, which the present respondent has sought and obtained in chancery, must now be considered as complete; for where a court of chancery has jurisdiction of the *principal subject*, it will take into consideration *the incidents*, and do justice in the case. To restore a party to his former situation means, *ex vi termini*, giving him complete redress.

(a) *Fetter v. Beal*, 1 *Ld. Raym.* 399. 692. *Taylor v. Coles et al.*  
1 *Hen. Bla.* 555—561.



Feb. 1807. 2. That the present application is the *proper mode*  
 TALCOTT of taking advantage of this matter.(a)  
 v.  
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BY THE COURT,

The petition was adjudged insufficient.

(a) *Gilb. Chan.* 200—202. *Martin v. Martin*, 1 *Ves.* 211. *Brooks et Ux. v. Reynolds*, 1 *Bro. Chan. Cas.* 183. *Hardcastle v. Chettle*, 4 *Bro. Chan. Cas.* 163. *Mayor and Corporation of York v. Pilkington*, 2 *Atk.* 302.

WILLIAM TALCOTT against MASON F. COGSWELL.

Where there are several endorsors of a promissory note, they are, in general, liable to each other, in the order of their respective endorsements.

THIS was an action of *assumpsit* by the second endorser of a promissory note against the first endorser, for one moiety of the amount of the note, paid by the plaintiff, on the failure of the maker. The action was commenced in *December*, 1804.

The case, as it appeared from the evidence, was as follows: In the latter part of the year 1800, *Samuel Tudor* held *William Howe's* note, endorsed by the defendant, for 500 dollars. When that note became payable, *Howe* called on *Tudor*, and offered him, in part payment, another note, with the same names, for 400 dollars. *Tudor* objected to receiving it, without another name on the back; upon which it was agreed that the plaintiff's should be added. *Howe* accordingly presented the note

*A.* being indebted to *B.* by note, and proposing to pay part by a new note, makes his note payable to *C.* and then procures *C.*, and afterwards *D.* to endorse it, for *A.'s* accommodation; the note becoming due, after having been accepted by *B.*, and discounted for him at the bank, *A.* fails to take it up, and *C.* and *D.*, after notice of such failure, come separately to the bank, and take it up, each paying a moiety. In an action brought, more than three years afterwards, by *D.* against *C.*, to recover back the money paid by *D.* on the note, these circumstances furnish sufficient evidence, that the endorsement by both was *joint*, and each having paid what, in that case, each would be compellable to pay, no recovery can be had.

to the plaintiff, who endorsed his name under that of the defendant. The note was then delivered by *Howe* to *Tudor*, who got it discounted at the *Hartford* bank. *Howe* failed to take it up; the endorsors were both notified; and each came separately to the bank, and paid 200 dollars.

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TALCOTT  
v.  
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*T. S. Williams* and *S. Terry*, for the plaintiff.

*Goodrich* and *Dwight*, for the defendant.

SWIFT, Pr. J. in summing up. There is no question but that the first endorser is liable to the subsequent endorsors, in case they have to pay the money. The question, in this case, is a question of fact, whether both plaintiff and defendant were not *joint sureties* to *Tudor* for *Howe*?

The jury found a verdict for the plaintiff.

THE COURT were of opinion, that the circumstances of the case furnished sufficient evidence that the endorsement was *joint*; and that each having paid what, in that case, each would be compellable to pay, the verdict ought to be for the defendant. They, therefore, returned the jury to a second, and afterwards to a third consideration; but the jury adhered to their verdict.

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A

ABANDONMENT.

In case of an insurance upon profits, and a total loss, no abandonment is necessary. *Fosdick v. Norwich Marine Insurance Company*, 108

ABATEMENT.

A writ of error cannot be brought by one only of several respondents to a bill in chancery, against whom a decree has been passed; but all must join. *Phelps v. Ellsworth*, 144

ACCOUNT.

1. In an action of account, alleging that the plaintiff and defendant

built a ship under an agreement, that each should contribute an equal moiety of the expense, and receive an equal moiety of the avails; that she received a cargo, and was sent to *Baltimore*, by the plaintiff and defendant; thence by direction of the plaintiff and defendant she went to *London* with a cargo on freight; and afterwards performed several other voyages with a cargo on freight, and was, at last, sold at *Cadiz*; and that the defendant received more than his proportion of the ship, both of the voyages and the sale: Held, that the plaintiff and defendant were to be considered, under this declaration, as joint owners of the ship, and jointly interested in all her voyages, from the time she was built until she was sold; and that in order to adjust the accounts of the parties, it was proper for the auditors to in-

quire into the earnings of the ship, and the losses incidental to the voyages. *Hale v. Hale*, 377

2. An attorney may be liable for a debt lost by his negligence, but he is not of course liable for the loss of the evidence of that debt. And in a suit brought against him for such loss, he may show that the plaintiff had another remedy for the recovery of his debt, which he has successfully pursued. *Huntington v. Rumrill*, 390

*Vide ASSUMPSIT, No. 4.*

### ACTION.

1. A man cannot collaterally impeach, or call in question, a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence, while such decree remains in force. *Peck v. Woodbridge*, 30
2. The condition of a bond being that the defendant should carry on the business of distilling cider brandy seven years and three months, and keep an exact account of the quantity distilled, and deliver to the plaintiff, when demanded, one tenth part thereof; and it appearing, that the defendant did carry on said business, but kept no account, and delivered nothing to the plaintiff; it was held, that the plaintiff could have no right of action on the bond until the end of said term. *Cottle v. Payne*, 289
3. On the 26th of October, 1805, A. agreed to finish a ship then partly built, in about one month, and then sell her to B. at a certain price per ton, payable in a manner, and at times specified. On the 8th of February, 1806, B. gave his note for the payment of a certain sum as soon as that amount should become due on the contract. Held, that this note became payable only upon a strict fulfilment of the contract on the part of A.; that a finishing and delivery of the ship on the 30th of

April, 1806, was not such a fulfilment; and that a release from B. of all exceptions arising from a non-fulfilment would not give A. a right of action on the note. *Smith v. Barker*, 316

*Vide Hanford v. Pennoyer*, in note, 35

### AFFIDAVIT.

1. An affidavit in support of a motion to put off a cause for the absence of a witness, cannot be explained by matters extrinsic. *Smith v. Barker*, 280
2. After an affidavit in support of a motion for the continuance of a cause, on the ground of the absence of a material witness, has been made, the opposite party may make a counter affidavit, stating any circumstances that render it impossible, or improbable, that the evidence of the witness can be obtained within a reasonable time; but such counter affidavit must not deny the materiality of the evidence. *Anonymous*, 308

### ALIEN.

The courts of the *United States* will not hold jurisdiction of a cause on the ground that one of the parties is an alien, unless he is stated to be such in express terms. *Michaelson v. Dennison*, 294

### AMENDMENT.

1. Amendment, when allowed. *Michaelson v. Dennison*, 294
2. A declaration may be amended in any stage of the trial, before the case is actually committed to the jury. *Smith v. Barker*, 315
3. A material amendment allowed in a bill to redeem, without costs. *Burnham v. Goodwin*, 496
4. In what cases of amendment costs must be paid. *Huntington v. Sheldon*, 497

ARREST.

*Vide* EXECUTION, No. 1.

ARREST OF JUDGMENT.

It is a sufficient ground of arrest of judgment, that one of the jurors conversed about the cause, while it was on trial, with persons not of the jury. *Bennet v. Howard*, 219

ASSIGNMENT.

1. An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be brought before the circuit court of the *United States*, though the maker and payee of such note are citizens of the same state. *Codwise v. Gleason*, 3
2. Under the late bankrupt law of the *United States*, a right of action founded on a *tort* did not pass, by a general assignment of the bankrupt's estate, to the assignees. *Bird v. Clark*, 272

ASSIGNMENT OF BOOK DEBTS.

In the assignment of a book debt, notice to the debtor is indispensable; for, until such notice is given, the property remains in the assignor's possession, and is liable for his debts. *Woodbridge v. Perkins*, 364

ASSUMPSIT.

1. *Assumpsit* will lie for articles or services commonly charged on book. *Edwards v. Nichols*, 16
2. A declaration for labour done, or services performed, generally, is good. *ib.*
3. In *assumpsit*, though for articles commonly charged on book, the parties cannot be permitted to testify. *ib.*
4. If one receives money of another for

a specific purpose, and fails to apply it, *assumpsit* will lie. *Wales v. Wetmore*, 252

5. A promise by one of the heirs to pay a sum of money to his coheir, in compliance with the determination of distributors appointed by the heirs and devisees of an estate of a deceased person, is without consideration, and void. *Munson v. Munson*, 260
6. After judgment in an action of *assumpsit*, the promise alleged may be considered as an express, or even a written promise. *Huntington v. Todd*, 465
7. That *H.* being liable to pay the debt of *T.* did pay it, is a good consideration to support a promise by *T.* to repay *H.* *ib.*
8. *Indebitatus assumpsit*, for money had and received *ad computandum* cannot be sustained, unless the defendant expressly promise to pay a particular sum. *Collins v. Phelps*, 506

ATTORNEY.

An attorney may be liable for a debt lost by his negligence, but he is not of course liable for the loss of the evidence of that debt. And in a suit brought against him for such loss, he may show that the plaintiff had another remedy for the recovery of his debt, which he has successfully pursued. *Huntington v. Rumnill*, 390

AWARD.

*Vide* JURISDICTION, No. 3.

B

BAIL.

1. The right of bail to arrest and confine the person of his principal is transitory, and may be exercised wherever the latter may be found. *Pease v. Burt*, 485



2. But if the bail in arresting his principal makes use of more force than is necessary for the purpose, he will be liable for false imprisonment. *Pease v. Burt*, 485

## BANKRUPT.

1. The assignee of a bankrupt, under the late bankrupt law of the *United States*, must prove title, in an action of ejectment, like any other party, by producing the original deeds. *Talcott v. Goodwin*, 264
2. Under the late bankrupt law of the *United States*, a right of action founded on a *tort* did not pass, by the general assignment of the bankrupt's estate, to the assignees. *Bird v. Clark*, 272

*Vide EVIDENCE*, No. 16.

## BOND.

1. The condition of a bond being that the defendant should carry on the business of distilling cider brandy for seven years and nine months, and keep an exact account of the quantity distilled, and deliver to the plaintiff, when demanded, one tenth part thereof; and it appearing that the defendant did carry on said business, but kept no account, and delivered nothing to the plaintiff; it was held, that the plaintiff could have no right of action on the bond until the end of said term. *Cottle v. Payne*, 289
2. Payment of a bond will not be presumed from lapse of time alone within a shorter period than twenty years, *ib.*
3. A bond was given to A., B. and C., committee of an ecclesiastical society, and their successors in office; after the removal of the obligees named in the bond, the successors brought an action on the bond in their own names: Held, that the action was well brought. *Bailey v. Lewis*, 450

## BOOK DEBT.

1. *Assumpsit* will lie for articles, or services, commonly charged on book. *Edwards v. Nichols*, 16
2. Book debt will lie for necessities furnished to an infant, without a request from the party liable, or a promise to pay for them. *Stanton v. Willson*, 37
3. A wife may be a witness for her husband in an action of book debt, especially after his death, though the charges accrued in his life-time, *ib.*
4. A record, that the defendant in an action of book debt appeared, and pleaded that he owed the plaintiff nothing, but that the plaintiff owed him, and judgment that the parties were fully heard thereon, is conclusive against him, in another action on book. *Lane v. Cook*, 255

*Vide ASSUMPSIT*, No. 3.

## C

## CAUTION.

1. Before caution can be entered with the town clerk, upon land conveyed by deed not acknowledged, the grantee must have required the grantor, and the grantor must have refused, to acknowledge the deed. *Bond v. Kibbe*, 500
2. Caution having been entered, after such demand and refusal, the deed, though unacknowledged, may be given in evidence in an action of ejectment, *ib.*

## CERTIFICATE.

*Vide IDLE PERSONS. EVIDENCE*, No. 20.

## CHALLENGE.

*Vide JURY*, No. 6.

CHANCERY.

1. If a person, intending to make a family settlement of his estate, in nature of a testamentary disposition, conveys lands to his sons, by several deeds, and the deed to one proves defective, chancery, after the death of the grantor, will compel his heirs and widow to perfect the title of the grantee. *M'Call v. M'Call*, 402
2. A decree of chancery having been reversed on the ground of fraud practised in obtaining it, and the party injured restored to his former situation; and an action at law having been brought to recover damages for the fraud; chancery will not interpose to grant an injunction against that action, on an application, by the opposite party, for that purpose. *Peck v. Woodbridge*, 508

*Vide* MORTGAGE.

CIRCUIT COURT OF THE UNITED STATES.

1. An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be brought before the circuit court of the *United States*, though the maker and payee of such note are citizens of the same state. *Codwise v. Gleason*, 3
2. If a party is described as a citizen of the *district of New-York*, he is sufficiently described as a citizen of the *state of New-York*. *Edwards v. Nichols*, 16

CITIZEN.

1. If a party is described as a citizen of the *district of New-York*, he is sufficiently described as a citizen of the *state of New-York*. *Edwards v. Nichols*, 16
2. In an action of ejectment for lands in *Connecticut*, if which the defendants had disseised the plaintiffs 18

months before, and continued in possession, part of the plaintiffs were described as citizens of *Vermont*, and part as citizens of *Connecticut*, and the defendant was described as a citizen of *New-York*, dwelling in *Connecticut*: Held, that the plaintiffs were not citizens of *Vermont*, nor the defendant a citizen of *New-York*, within the constitution and laws of the *United States*; and that the cause, therefore, was not within the jurisdiction of this court. *Bissell v. Horton*, 281

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*Vide* EVIDENCE, No. 4. 6.

COMMON LAW.

1. Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law *Knowles v. State*, 103
2. If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplage, and will not vitiate, *ib.*

*Vide* ESTATE-TAIL, No. 2.

CONCLUSIVENESS OF A JUDGMENT OR DECREE.

1. A man cannot collaterally impeach or call in question a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence, while such decree remains in force. *Peck v. Woodbridge*, 30
2. The decree of a court of probate establishing a will containing a devise of real estate, is conclusive upon the heirs of the deviser, until disaffirmed on appeal, or set aside in due course of law. *Judson v. Lake*, 318

*Vide* *Hanford v. Pennoyer*, in note, 35

## CONFESSIONS.

*Vide EVIDENCE, No. 23.*

## CONSERVATOR.

If a plaintiff *sues or pleads by conservator*, and the record is in usual form, and judgment in his favour, it will be good; and those words will be rejected as surplusage. *Woodford v. Webster*, 472

## CONSIDERATION.

That *H.* being liable to pay the debt of *T.* did pay it, is a good consideration to support a promise by *T.* to repay *H.* *Huntington v. Todd*, 465

*Vide DISTRIBUTORS, No. 2. USURY, No. 5.*

## CONSTRUCTIVE POSSESSION.

*Vide TRESPASS, No. 3.*

## CONTRACT.

1. A contract to reprint any literary work in violation of a copy-right secured to a third person, is void; and the printer who executes such contract, with a knowledge of the rights of such third person, can recover nothing for his labour. *Nichols v. Ruggles*, 145
2. On the 26th of October, 1805, *A.* agreed to finish a ship then partly built, in about one month, and then sell her to *B.* at a certain price per ton, payable in a manner, and at times specified. On the 8th of February, 1806, *B.* gave his note for the payment of a certain sum as soon as that amount should become due on the contract. Held, that this note became payable only upon a strict fulfilment of the contract on the part of *A.*; that a finishing and delivery of the ship on the 30th of April, 1806, was not such a fulfil-

ment; and that a release from *B.* of all exceptions arising from a non-fulfilment, would not give *A.* a right of action on the note. *Smith v. Barker*, 316

3. Where a fund was bequeathed to the ecclesiastical society of *N.*, *S.*, the interest of which was to be applied for the purpose of maintaining a free school in one of the districts, it was held, that an agreement by the society to divert this fund from the object for which it was given, and apply it to the support of the ministry, was void, being a fraud upon third persons. *Bailey v. Lewis*, 450

*Vide PROMISSORY NOTES, No. 3.*

## CONVEYANCE, FRAUDULENT.

1. *A.* on the eve of a failure, made a general assignment of his effects, and gave immediate possession to *B.* one of his creditors, in trust, to satisfy the debts due to *B.* and certain other meritorious creditors specified, and to pay over the surplus, if there should be any, to the creditors generally. *C.* and *D.*, creditors not specially named, soon afterwards attached those effects in the hands of *B.*, as the property of *A.* Held, that this conveyance was not by law fraudulent against the attachment of creditors. *Hempsted v. Starr*, 340

## COPY.

*Vide EVIDENCE, No. 20. 25, 26.*

## COPY-RIGHT.

1. A contract to reprint any literary work in violation of a copy-right secured to a third person, is void; and the printer who executes such contract, with a knowledge of the rights of such third person, can recover nothing for his labour. *Nichols v. Ruggles*, 145



2. The provisions of the act of congress requiring the author or proprietor to publish the title of his book in a newspaper, and to transmit a copy of the work itself to the secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copy-right. *Nichols v. Ruggles*, 145

### CORPORATION.

1. Serving a summons on any private individual of a corporation is not sufficient notice to hold the corporation to trial. *Rand v. Bull*, 441
2. And the individual summoned may plead the want of notice to the corporation, *ib.*
3. A bond was given to A., B. and C., committee of an ecclesiastical society, and to their successors in office; after the removal of the obligees named in the bond, the successors brought an action on the bond in their own names: Held, that the action was well brought. *Bailey v. Lewis*, 450
4. The confessions of individual members of a corporation aggregate, a party to the suit, which were not made in the exercise of any corporate duty, cannot be received in evidence. *Hartford Bank v. Hart*, 493

### COSTS.

1. A. having a suit pending in court against B., the parties mutually agreed, that it should be called out, and submitted to arbitration, and that the costs which had arisen, and should arise thereon, should follow the award. The arbitrators met, and A. attended, but B. revoked his submission. In an action on the case for such revocation, it was held that A. was entitled to recover as well the costs in the suit at law, as those under the submission; both of which, as stated in the declaration, amounting to more than

seventy dollars, gave the superior court jurisdiction of the cause. *Rowley v. Young*, 118

2. The circuit court of the United States, in the exercise of their discretion, will not tax costs against a prevailing plaintiff, except where he must have known that he was not entitled to recover 500 dollars. *Cottle v. Payne*, 289
3. A material amendment allowed, in a bill to redeem, without costs. *Burnham v. Goodwin*, 496
4. In what cases of amendment costs must be paid. *Huntington v. Sheldon*, 497

### COVENANT.

1. In an action of covenant against a master, for sending his apprentice out of the country, parol evidence is admissible, on the plea of not guilty, to prove that the plaintiff consented to the act. *Burden v. Skinner*, 126
2. A. conveyed to B. with covenants of seisin and warranty, a piece of land containing thirteen acres, bounded north and south by undisputed limits, east by the land of C., and west by that of A. In an action of trespass *quare clauum fregit*, brought by B. against C. to which the defendant pleaded title, claiming that the dividing line between his land and that conveyed to the plaintiff was west of the *locus in quo*, A. was offered as a witness to disprove the defendant's claim, after a release from the covenants in his deed had been executed by the plaintiff to him: Held, that A. was an incompetent witness, being interested to establish the dividing line as far eastward as possible, and that the release did not restore his competency, as the covenants in his deed run with the land. *Abby v. Goodrich*, 433

### CRIMES.

1. Every public show and exhibition

which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. *Knowles v. State*, 103

2. If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplusage, and will not vitiate, *ib.*

## CUSTOM OF MERCHANTS.

In an action against the owners of a vessel, for a quantity of gold and silver coin, taken by the master at *Nevis*, on freight, evidence of a custom of merchants in *Connecticut* and *New-York*, that the freight of money received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners, was held to be admissible. *Halsey v. Brown*, 346

## D

### DAMAGES, RULE OF.

In an action of trespass for taking and detaining a ship, it was held, that the plaintiff was entitled to give in evidence a process in replevin by *C.* a third person, a replevin bond by *D.* and *E.*, as sureties, and a judgment thereon in favour of the defendant, and to prove that he the plaintiff had indemnified those sureties, for the purpose of showing that he became liable to the defendant for the amount of his claim against *C.*; and that this sum ought to be the rule of damages. *Bird v. Clark*, 273

### DAMAGES.

1. Payment of a bond will not be presumed from lapse of time alone within a shorter period than twenty years. But where the demand is a stale one, the plaintiff will be held

to strict proof of the amount of damages, which he is entitled to recover. *Cottle v. Payne*, 289

2. In an action for a vexatious suit, the plaintiff having stated, that in the original suit, he recovered his costs, alleged, that he was most injuriously imprisoned on said suit, for the space of twenty-four hours, and in defending the same expended large sums of money, to wit, the sum of 200 dollars in employing counsel to defend; also the sum of 200 dollars in paying witnesses, and maintaining them when attending on the trial; also the sum of 100 dollars in making various journeys to procure testimony, and in attending on the trial; without showing that such damages exceeded the costs recovered: Held, this was a sufficient allegation of damages. *Sterling v. Adams*, 411
3. In trespass *vi et armis*, the damages are not limited by the value of the property destroyed. *Edwards v. Beach*, 447

### DATE.

In a policy of insurance, the clause "prior in date," referring to other policies upon the same risk, is equivalent with *prior in time*. *Brown v. Hartford Insurance Company*, 58

### DECLARATION.

1. A declaration for labour done, or services performed, generally, is good. *Edwards v. Nichols*, 16
2. In an action on a promissory note for 80 dollars, to be paid in good *West-India rum*, sugar, or molasses, at the election of the payee, within eight days after date, it was held to be unnecessary to aver, that the payee made his election, and gave notice thereof to the promissor, as the latter was bound, at all events, to make payment in one of the articles specified, within eight days, and on failure, became immediately liable. *Townsend v. Wells*, 327

DECREE.

A man cannot collaterally impeach, or call in question a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence, while such decree remains in force. *Peck v. Woodbridge*, 30

*Vide EVIDENCE, No. 3.*

DEED.

1. A man may show that he was *non compos mentis*, in avoidance of his deed. *Webster v. Woodford*, 90
2. If a person, intending to make a family settlement of his estate, in nature of a testamentary disposition, conveys lands to his sons, by several deeds, and the deed to one proves defective, chancery, after the death of the grantor, will compel his heirs and widow to perfect the title of the grantee. *M'Call v. M'Call*, 402
3. A grant of land to *A.* to continue for a yard to build vessels in, by *A.* and his heirs, so long as they shall see fit, but if they cease to use it for this purpose, not to be sold by them, but for ever to remain to *B.* and his heirs, gives *A.* no more than an estate for life, and the remainder to *B.* is good. *Rutty v. Tyler*, 470

DESCENT.

1. The maxim *seisina facit stipitem* has never been adopted in this state; but on the death of the ancestor, the descent is cast upon the heir, without any reference to the actual seisin of such ancestor. *Hillhouse v. Chester*, 166
2. By the statute of distributions, previous to the revision in 1784, real and personal property were placed upon the same footing; and the term "*next of kin*" had the same meaning, whether used with reference to one or the other. When used with reference to real estate,

it never meant those only of the blood of the first purchaser. *Hillhouse v. Chester*, 166

DEPARTURE.

*Quere*, whether after a plea of *no award*, a rejoinder of a *revocation* is a departure? *Fowler v. Clark*, 231

DEVISE.

*A.* devised his lands to his son *B.* and his male heir, but if he should have no male heir, then to his daughters; and if he should die without issue, then to the daughters of *A.* Held, that *B.* took an estate-tail. *Hamilton v. Hempsted*, 332

DISCHARGE.

*Vide PROMISSORY NOTES, No. 4.*

DISSOLUTION OF PARTNERSHIP.

1. *A.* and *B.* of *New-York*, and *C.* of *Norwich*, in *Connecticut*, having been partners in trade, dissolved their partnership, and published notice of such dissolution, for several weeks successively, in two newspapers, one printed at *Norwich*, which was their usual place of doing business, and the other at *New-London*, in the vicinity. *B.* afterwards endorsed a bill of exchange in *New-York*, with the company name; but whether the endorsee had or had not actual notice of the dissolution did not appear; nor did it appear that he had ever been a correspondent of the company. Held, that these facts constituted reasonable notice to him, and to every other person not a correspondent of the company. *Mowatt v. Howland*, 553
2. The facts which are supposed to constitute notice of a dissolution of partnership being ascertained, it is a question of law whether the notice be reasonable, or not, *ib.*



## DISTRIBUTORS.

1. A distribution of the estate of a deceased person, cannot be made by distributors appointed by the heirs and devisees. *Munson v. Munson*, 260
2. A promise, by one of the heirs, to pay a sum of money to his co-heir, in compliance with the determination of such distributors, is without consideration, and void, *ib.*

## DISTRIBUTIONS, STATUTE OF.

By the statute of distributions, previous to the revision in 1784, real and personal property were placed upon the same footing; and the term "next of kin" had the same meaning, whether used with reference to one or the other. When used with reference to real estate, it never meant those only of the blood of the first purchaser. *Hillhouse v. Chester*, 166

## E

## EJECTMENT.

*Vide* BANKRUPT, No. 1.

## EMBARGO.

1. The homeward bound cargo of a vessel having proceeded to a foreign port in contravention of the act of congress of the 9th of January, 1808, supplementary to the general embargo act, is not liable to condemnation. *United States v. Brig James Wells*, 296
2. *Semb.* On a libel against the vessel for having thus proceeded, necessity, arising from the stress of weather, and the condition of the vessel, is no defence, *ib.*

## ENDORSEE.

*Vide*, PROMISSORY NOTES. JURISDICTION, No. 1.

## ENDORSEMENT.

1. Though a note is void as against the maker, it may be good against an endorser, in favour of an endorsee, who took it, relying upon the endorsement. *Codwise v. Gleason*, 12
2. The contract made by endorsement, extends to all future endorsees, even where notes are not negotiable, *ib.*
3. Whether, in an action by the endorsee of a negotiable note against the maker, a discharge by the payee shall be available as a defence, until it be shown by the maker, that the receipt was given before the endorsement was made? *Stuart v. Greenleaf*, 311
4. Where there are several endorsors of a promissory note, they are, in general, liable to each other, in the order of their respective endorsements. *Talcott v. Cogswell*, 512
5. *A.* being indebted to *B.* by note, and proposing to pay part by a new note, makes his note payable to *C.*, and then procures *C.*, and afterwards *D.* to endorse it for *A.*'s accommodation; the note becoming due, after having been accepted by *B.* and discounted for him at the bank, *A.* fails to take it up, and *C.* and *D.* after notice of such failure, come separately to the bank, and take it up, each paying a moiety. In an action brought more than three years afterwards, by *D.* against *C.* to recover back the money paid by *D.* on the note, these circumstances furnish sufficient evidence that the endorsement by both was joint, and each having paid what in that case each would be compellable to pay, no recovery can be had, *ib.*

## ENDORSOR.

*Vide* PROMISSORY NOTES. JURISDICTION, No. 1.

## ENTRY, RIGHT OF.

An actual ouster, and adverse possession, continued uninterruptedly for

fifteen years, will bar the original proprietor of his right of entry, whether the ouster and adverse possession were by the same person or persons, for the whole term, or by different persons for different portions of it. *Fanning v. Wilcox*, 258

### ERROR, WRIT OF.

A writ of error cannot be brought by one only of several respondents to a bill in chancery, against whom a decree has been passed; but all must join. *Phelps v. Ellsworth*, 144

### ESTATE FOR LIFE.

A grant of land to *A.* to continue for a yard to build vessels in, by *A.* and his heirs, so long as they shall see fit, but if they cease to use it for this purpose, not to be sold by them, but for ever to remain to *B.* and his heirs, gives *A.* no more than an estate for life, and the remainder due to *B.* is good. *Rutty v. Tyler*, 470

### ESTATE-TAIL.

1. *A.* devised his lands to his son *B.* and his male heir; but if he should have no male heir, then to his daughters; and if he should die without issue, then to the daughters of *A.* Held, that *B.* took an estate-tail. *Hamilton v. Hempsted*, 332
2. By the common law of *Connecticut*, an estate-tail became an estate in fee-simple in the issue of the first donee in tail, *ib.*

### EVIDENCE.

1. In *assumpsit*, though for articles and services commonly charged on book, the parties cannot be permitted to testify. *Edwards v. Nichols*, 16
2. In an action of covenant against a master, for sending his apprentice out of the country, parol evidence is admissible, on the plea of *not guilty*,

to prove that the plaintiff consented to the act. *Burden v. Skinner*, 126

3. A decree in chancery finding an *immaterial fact*, is not admissible, in a subsequent suit at law between the same parties, to prove such fact. *Hotchkiss v. Nichols*, 138
4. In *indebitatus assumpsit* for money paid to the defendants' use, the declaration stated, that an execution had been issued against the defendants, inhabitants of the town of *Newtown*, for taxes; that property had been taken thereon, for which the plaintiff had given his receipt; and that in consequence thereof, he had been compelled eventually to pay this money in satisfaction of said taxes. At the trial, evidence was produced of an execution against the collector. Held, that there was no material variance. *Beers v. Botsford*, 159
5. The issuing of a distress by the treasurer of the state against the inhabitants of a town, may be proved by parol, *ib.*
6. It is unnecessary to prove the existence of a distress against the collector, in order to let in proof of one against the selectmen, *ib.*
7. The plaintiff declared, that the defendant, being master of the ship on board of which the plaintiff was a seaman, left the plaintiff, contrary to his will, on a desolate island in the *South Sea*. The defendant proved, that he commanded the plaintiff to leave the island and come on board the ship, which the plaintiff refused to do. The plaintiff, to show that he had fears of ill usage, then offered to prove particular instances of abuse of the crew, by the inferior officers of the ship. Held, that such evidence was not admissible. *Bennett v. Howard*, 219
8. In an action of *assumpsit* by *A.* claiming to be a proprietor of *Gore Scrip*, against *B.*, *C.* and *D.*, who had received money for the use of the proprietors, the defendants cannot give in evidence a receipt signed by the plaintiff and another for such *Scrip* to account with the company, to prove

- that the plaintiff is not a proprietor.  
*Root v. Buell*, 227
9. The assignee of a bankrupt under the late bankrupt law of the *United States*, must prove title, in an action of ejectment, like any other party, by producing the original deeds.  
*Talcott v. Goodwin*, 264
  10. In an action of trespass, for taking and detaining a ship, it was held, that the plaintiff was entitled to give in evidence a process in replevin by *C.* a third person, a replevin bond by *D.* and *E.*, as sureties, and a judgment thereon in favour of the defendant, and to prove that he the plaintiff had indemnified those sureties, for the purpose of showing that he became liable to the defendant for the amount of his claim against *C.*, and that this sum ought to be the rule of damages. *Bird v. Clark*, 272
  11. Where a party states a contract, which, from evidence exhibited on the trial, appears to have been in writing, he must either produce it, or show that it is not in his power to do it; otherwise no proof of its execution or contents will be received. *United States v. Porter*, 283
  12. Payment of a bond will not be presumed from lapse of time alone, within a shorter period than twenty years. *Cottle v. Payne*, 289
  13. But where the demand is a stale one, the plaintiff will be held to strict proof of the amount of damages, which he is entitled to recover, *ib.*
  14. In an action against *A.* and *B.*, as partners, on a contract executed in the partnership name, *A.* suffered a default, and *B.* pleaded the general issue: Held, that letters written by *A.* in the partnership name, could not be read in evidence by *B.* to show that he was not a partner with *A.* *Champlin v. Tilley*, 305
  15. In such case, an account book, containing entries made by *A.* and *B.* may go to the jury as evidence of partnership, *ib.*
  16. In an action on a promissory note executed by *A.* and *B.* jointly, brought against *B.* only, after the bankruptcy of *A.* under the laws of the *United States*, it was held, that the admissions of *A.* were evidence against *B.* *Howard v. Cobb*, 309
  17. In an action against the owners of a vessel, for a quantity of gold and silver coin, taken by the master at *Nevis*, on freight, evidence of a custom of merchants in *Connecticut* and *New-York*, that the freight of money received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners, was held to be admissible. *Halsey v. Brown*, 346
  18. An attorney may be liable for a debt lost by his negligence, but he is not of course liable for the loss of the evidence of that debt. And in a suit brought against him for such loss, he may show that the plaintiff had another remedy for the recovery of his debt, which he has successfully pursued. *Huntington v. Rumrill*, 390
  19. The record of such recovery will be proper evidence of this fact, although the attorney was no party to it, *ib.*
  20. A copy of a certificate of survey, signed *A. B.*, surveyor, and *C. D.* and *E. F.*, committee, and certified to be a true copy, by *G. H.*, register, is not admissible in evidence to prove the plaintiff's title. *Wells v. Tryon*, 489
  21. Putting a letter into the post-office, is a fact from which the jury may infer, that the person to whom it was addressed had notice of its contents. *Hartford Bank v. Hart*, 492
  22. In an action by the endorsee of a promissory note against the defendant as endorser, on the ground, that though the endorsement was a forgery, yet he had made it his own; and it having been proved that his name had been forged on other notes discounted at the bank, of which he had had notice, he cannot be permitted to prove that the names of other persons had been forged under similar circumstances, of which they had had notice, *ib.*
  23. The confessions of individual members of a corporation aggregate, a party to the suit which were not



- made in the exercise of any corporate duty, cannot be received in evidence. *Hartford Bank v. Hart*, 492
24. An attorney cannot be compelled to produce in evidence a paper which was left with him by a client in another cause. *Lynde v. Judd*, 499
25. Where an original paper is in the hands of an attorney under such circumstances that he cannot be compelled to produce it in evidence, the party may prove and exhibit a copy, *ib.*
26. A copy may be proved by comparing it with the original as read by another person, *ib.*
27. *Quere*, whether there ought not to be some evidence that the paper read as the original was in fact such, *ib.*
28. Caution having been duly entered with the town-clerk, upon land conveyed by deed not acknowledged, such deed, after demand upon the grantor, and refusal by him to acknowledge the same, may be given in evidence, though unacknowledged, in an action of ejectment. *Bond v. Kibbe*, 500

*Vide* VARIANCE, No. 2.

## EXAMINATION OF WITNESSES.

When a witness has been examined by the party against whom he is called, as to his interest in the event, other witnesses cannot be inquired of as to his interest; and it makes no difference whether such examination was under the general oath, or the *voire dire*; nor whether it was in court, or before a magistrate, taking a deposition out of court. *Butler v. Butler*, 214

## EXECUTION.

An execution, after the expiration of the term within which it was made returnable, is of no avail, and an arrest under it is a trespass. *Stoyel v. Lawrence*, 1

*Vide* EVIDENCE, No. 4.

## EXECUTORS.

A power to two executors to sell and dispose of an estate, in such way and manner as they shall judge most beneficial to the devisees, will not give one of them a power to sell, nor will it authorize one or both to enter upon and occupy the estate. *Bull v. Bull*, 384

*Vide* POWER.

## EXHIBITION.

Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. *Knowles v. State*, 103

## F

## FALSE IMPRISONMENT.

*Vide* BAIL, No. 2. EXECUTION.

## FAMILY SETTLEMENT.

If a person, intending to make a family settlement of his estate, in nature of a testamentary disposition, conveys lands to his sons, by several deeds, and the deed to one proves defective, chancery, after the death of the grantor, will compel his heirs and widow to perfect the title of the grantee. *M'Call v. M'Call*, 402

## FEE-SIMPLE.

*Vide* DEED, No. 3.

## FEME COVERT.

*Vide* CONCLUSIVENESS OF A SENTENCE OR DECREE, No. 2.

## FORECLOSURE.

Upon a bill of foreclosure by a mortga-

gee holding separate mortgages for distinct debts, chancery will decree a foreclosure, upon the failure of the mortgagor to pay *both* debts, and will not make separate decrees for each debt. *Phelps v. Ellsworth*, 397

#### FOREIGN ATTACHMENT.

1. *A.* gave a legacy to the wife of *B.* payable in three and six years from the testator's death; *C.* a creditor of *B.* attached this legacy, by process of foreign attachment, in the hands of *A.*'s executor, and demanded the same of him, on execution, before the first instalment became due, and then brought a *scire facias* against him to answer the debt out of his own estate: Held, that he was not liable. *Benton v. Dutcher*, 436
2. *Quere*, whether a legacy due to the wife, but not reduced to possession, can be attached, by process of foreign attachment, for a debt due from the husband, *ib.*

#### FOREIGN JUDGMENT.

1. Letters of administration granted under the authority of another state, are of no avail in this. *Riley v. Riley*, 74
2. Letters testamentary issued under the authority of one state, are not available in another. *Champlin v. Tilley*, 303

#### FRAUD.

Where a fund was bequeathed to the ecclesiastical society of *N. S.*, the interest of which was to be applied for the purpose of maintaining a free-school in one of the districts, it was held, that an agreement by the society to divert this fund from the object for which it was given, and apply it to the support of the ministry, was void, being a fraud upon third persons. *Bailey v. Lewis*, 450

*Vide* ACTION, No. 1.

#### FRAUDULENT CONVEYANCE.

- A.* on the eve of a failure, made a general assignment of his effects, and gave immediate possession to *B.* one of his creditors, in trust, to satisfy the debts due to *B.* and certain other meritorious creditors specified, and to pay over the surplus, if there should be any, to the creditors generally. *C.* and *D.*, creditors not specially named, soon afterwards attached those effects in the hands of *B.*, as the property of *A.* Held, that this conveyance was not by law fraudulent against the attachment of creditors. *Hempstead v. Starr*, 349

#### FRAUDS AND PERJURIES.

1. A contract for the sale of things annexed to the freehold, but which are capable of separation without violence, and by the terms of the contract are to be separated, is not within the statute of frauds and perjuries. *Dostwick v. Leach*, 476
2. Nor is an agreement not to exercise a right regarding the freehold, as to use a mill, or to carry on a trade in a particular shop, within the statute, *ib.*
3. The statute contemplates a transfer of lands, or some interest in them, *ib.*

#### G

#### GENERAL ASSEMBLY.

In 1707, the *General Assembly* of *Connecticut* had not so far parted with their judicial authority, as to preclude them from awarding new trials in subordinate tribunals. *Hamilton v. Hempsted*, 332

#### GENERAL RULES.

*Vide* REGULÆ GENERALES.

GRANT.

- A grant of land to *A.* to continue for a yard to build vessels in, by *A.* and his heirs, so long as they shall see fit, but if they cease to use it for this purpose, not to be sold by them, but for ever to remain to *B.* and his heirs, gives *A.* no more than an estate for life, and the remainder to *B.* is good. *Rutty v. Tyler*, 470

GUARDIAN, APPOINTMENT OF.

- A motion for the appointment of a guardian to an infant party, must be in writing, and must state the name of the person proposed, and his consent to be appointed. *Hartshorn v. Sanford*, 279

H

HEIR.

*Vide* DESCENT, No. 1.

HUSBAND AND WIFE.

1. Husband and wife were divorced by a decree of the legislature; alimony was allowed her, which was to be in lieu of all claims of dower; and she was constituted sole guardian of two of their infant children: held, that the father was liable for the education and support of such children, furnished, in the first place, by her as guardian, and afterwards by a stranger, to whom she had been married. *Staunton v. Willson*, 37
2. A wife may be a witness for her husband in an action of book debt, especially after his death, though the charges accrued in his life-time, *ib.*

I

IDLE PERSONS.

The statute, tit. 88. c. 1. authorizing the

selectmen to take into their care and custody, the persons and property of persons likely to be reduced to want, by idleness, mismanagement, or bad husbandry, must have a strict construction, and be strictly pursued.

Therefore, where the selectmen, having taken the property of a person of that description, neglected to set up a certificate of their doings, and to make and lodge in the town clerk's office an inventory of the property taken, pursuant to the provisions of the 12th section, it was held, that they could not retain such property, and that the owner, after demand and refusal, was entitled to recover against them in trover. *Knapp v. Luckwood*, 131

IMMATERIAL FACT.

*Vide* EVIDENCE, No. 3.

INDEBITATUS ASSUMPSIT.

*Indebitatus assumpsit* for money had and received *ad computandum* cannot be sustained, unless the defendant expressly promise to pay a particular sum. *Collins v. Phelps*, 506

*Vide* ASSUMPSIT.

INDORSEE.

*Vide* ENDORSEE.

INDORSEMENT.

*Vide* ENDORSEMENT.

INDORSOR.

*Vide* ENDORSOR.

INDUCEMENT.

Facts stated by way of inducement to a material traverse, are not traversable; and the party, by joining issue on the facts traversed, does not ad-



mit the truth of the inducement.  
*Fowler v. Clark*, 231

### INFANCY.

A person may be liable for prosecuting, after he is of full age, a suit commenced by him maliciously, and without probable cause, while an infant. *Sterling v. Adams*, 411

### INFORMATION.

1. Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. *Knowles v. State*, 103
2. If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplusage, and will not vitiate, *ib.*
3. An information for an exhibition of a show, must particularly state the circumstances in which the indecency, barbarity, or immorality of it consists, that the court may judge whether it is an offence within the statute, tit. 116. s. 1. or at common law, *ib.*

### INJUNCTION.

A decree of chancery having been reversed on the ground of fraud practised in obtaining it, and the party injured restored to his former situation; and an action at law having been brought to recover damages for the fraud; chancery will not interpose to grant an injunction against that action, on an application, by the opposite party, for that purpose. *Peck v. Woodbridge*, 508

### INSURANCE.

1. In a policy of insurance, the clause "*prior in date*," referring to other policies upon the same risk, is equivalent with *prior in time*. *Brown v. Hartford Insurance Company*, 58

2. An interest in the vessel and cargo gives an interest in the profits of the voyage, which may be the subject of insurance. *Fosdick v. Norwich Marine Insurance Company*, 108
3. A insured 6,000 dollars, as profits on a cargo at and from *Bordeaux* to the *West Indies*. At the time of effecting the insurance, A. represented to the insurers that he had received advice from his correspondent at *Bordeaux*, of the vessel's arrival there, and of the state of the market, and that it was expected a cargo would be obtained, worth from 20,000 to 25,000 dollars. The vessel actually sailed with a cargo worth but 9,251 dollars. Held, there was no misrepresentation, *ib.*
4. In a case of an insurance upon profits, and a total loss, no abandonment is necessary, *ib.*

### INTEREST INSURABLE.

An interest in the vessel and cargo, gives an interest in the profits of the voyage, which may be the subject of insurance. *Fosdick v. Norwich Marine Insurance Company*, 108

### INVENTORY.

*Vide* IDLE PERSONS.

## J

### JOINT CONTRACT.

In an action on a joint contract against two, where one has suffered a default, and the other has obtained a verdict, judgment must be entered up for both. *Champlin v. Tilley*, 307

*Vide* EVIDENCE, No. 16.

### JOINT ENDORSEMENT.

*Vide* ENDORSEMENT, No. 5.

# JOINT INTEREST.

In an action of account, alleging that the plaintiff and defendant built a ship under an agreement that each should contribute an equal moiety of the expense, and receive an equal moiety of the avails; that she received a cargo, and was sent to *Baltimore*, by the plaintiff and defendant; thence, by direction of the plaintiff and defendant, she went to *London* with a cargo on freight; and afterwards performed several other voyages with a cargo on freight, and was, at last, sold at *Cadiz*; and that the defendant received more than his proportion of the ship, both of the voyages and the sale: Held, that the plaintiff and defendant were to be considered, under this declaration, as joint owners of the ship, and jointly interested in all her voyages, from the time she was built until she was sold; and that in order to adjust the accounts of the parties, it was proper for the auditors to inquire into the earnings of the ship, and the losses incidental to the voyages. *Hale v. Hale*, 377

while such decree remains in force. *Peck v. Woodbridge*, 30

2. In an action on a joint contract against two, where one has suffered a default, and the other has obtained a verdict, judgment must be entered up for both. *Champlin v. Tiley*, 307
3. An action sounding in tort against *A.* an inhabitant of the state of *Rhode Island*, and *B.* an inhabitant of this state, being brought to the county court, *A.* did not appear, nor put in a plea, but *B.* appeared and pleaded to the action, and judgment was rendered, at the first term, in favour of the defendant; the plaintiff then appealed to the superior court, and there had judgment in his favour: Held, that the proceedings of the county court were void, and the judgment of the superior court erroneous, being rendered without regular process in the cause. *Stoyel v. Westcott*, 349
4. A judgment which answers the issue, and on which execution was granted, will not be reversed, because it did not say that the party should recover, and that execution should issue: *Bradley v. Clark*, 502

# JUDGMENT, CONCLUSIVENESS OF.

A record, that the defendant in an action of book debt appeared, and pleaded that he owed the plaintiff nothing, but that the plaintiff owed him, and judgment that the parties were fully heard thereon, is conclusive against him, in another action on book. *Lane v. Cook*, 255

Vide JUDGMENT, No. 1.

# JUDGMENT.

1. A man cannot collaterally impeach, or call in question, a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence,

# JURISDICTION.

1. An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be brought before the circuit court of the *United States*, though the maker and payee of such note are citizens of the same state. *Codwise v. Gleason*, 3
2. If a party is described as a citizen of the *district of New-York*, he is sufficiently described as a citizen of the *state of New-York*. *Edwards v. Nichols*, 16
3. *A.* having a suit pending in court against *B.* the parties mutually agreed, that it should be called out, and submitted to arbitration, and that the costs which had arisen, and should arise thereon,

- should follow the award. The arbitrators met, and *A.* attended; but *B.* revoked his submission. In an action on the case for such revocation, it was held, that *A.* was entitled to recover as well the costs in the suit at law, as those under the submission; both of which, as stated in the declaration, amounting to more than seventy dollars, gave the *superior court* jurisdiction of the cause. *Rowley v. Young*, 118
4. In an action of ejectment for lands in *Connecticut*, of which the defendant had disseised the plaintiffs 18 months before, and continued in possession, part of the plaintiffs were described as citizens of *Vermont*, and part as citizens of *Connecticut*, and the defendant was described as a citizen of *New-York*, dwelling in *Connecticut*: Held, that the plaintiffs were not citizens of *Vermont*, nor the defendant a citizen of *New-York*, within the constitution and laws of the *United States*; and that the cause, therefore, was not within the jurisdiction of this court. *Bissell v. Horton*, 281
5. The courts of the *United States* will not hold jurisdiction of a cause on the ground that one of the parties is an *alien*, unless he is stated to be such in express terms. *Michaelson v. Dennison*, 294
5. In this case, the court appointed an officer to take care of the jury, and charged him not to suffer them to separate, until they had agreed in a verdict, nor to speak to them, except to ask them if they were agreed. *Anonymous*, 311
6. A juror who had married the sister of a party in another cause depending upon the same principles as the one on trial, excused from sitting, though his wife was then dead. *Hartford Bank v. Hart*, 491

## L

## LANDS.

*Vide* FRAUDS AND PERJURIES, No. 1.

## LEGACY.

*Vide* FOREIGN ATTACHMENT, No. 1.

## LETTERS OF ADMINISTRATION.

Letters of administration granted under the authority of another state are of no avail in this. *Riley v. Riley*, 74

## LETTERS TESTAMENTARY.

1. Letters testamentary issued under the authority of one state are not available in another. *Champlin v. Tilley*, 303
2. But if to an action brought by an executor, on a cause of action arising in the life-time of the testator, the defendant plead the general issue, the plaintiff cannot be required on the trial, to produce any letters testamentary, *ib.*

## JURY.

1. It is a sufficient ground of arrest of judgment, that one of the jurors conversed about the cause, while it was on trial, with persons not of the jury. *Bennet v. Howard*, 219
2. If a jury separate after a cause is committed to them, and before they have agreed in a verdict, and afterwards return a verdict, it will be set aside. *Lester v. Stanley*, 287

*Vide etiam* *Nicolls v. Whiting*, in note, *ib.*

3. Same points. *Howard v. Cobb*, 310
4. But neither the jurors, nor the officer to whose care they were committed can be compelled to testify to the fact of such separation, *ib.*

## LIMITATIONS, STATUTE OF.

An actual ouster, and adverse possession, continued uninterruptedly for fifteen years, will bar the original proprietor of his right of entry,



whether the ouster and adverse possession were by the same person or persons, for the whole term, or by different persons for different portions of it. *Fanning v. Wilcox*, 258

LUNACY.

*Vide* NON COMPOS MENTIS.

M

MAKER.

*Vide* PROMISSORY NOTES.

MARINERS.

The master of a vessel has a right, during the voyage, to punish his mariners, by corporal chastisement, for disobedience to any of his reasonable commands, and for insolence, and other offences. *Michaelson v. Dennison*, 294

MASTER AND APPRENTICE.

*Vide* COVENANT, No. 1.

MASTER OF A VESSEL.

The master of a vessel has a right, during the voyage, to punish his mariners, by corporal chastisement, for disobedience to any of his reasonable commands, and for insolence, and other offences. *Michaelson v. Dennison*, 294

MISREPRESENTATION.

1. Insured 6,000 dollars, as profits on a cargo, at and from *Bordeaux* to the *West Indies*. At the time of effecting the insurance, A. represented to the insurers, that he had received advice from his correspondent at *Bordeaux*, of the vessel's arrival there, and of the state of the mar-

ket, and that it was expected a cargo would be obtained worth from 20,000 to 25,000 dollars. The vessel actually sailed with a cargo worth but 9,251 dollars. Held, there was no misrepresentation. *Fosdick v. Norwich Marine Insurance Company*, 108

MORTGAGE.

Upon a bill of foreclosure by a mortgagee holding separate mortgages for distinct debts, chancery will decree a foreclosure, upon the failure of the mortgagor to pay both debts, and will not make separate decrees for each debt. *Phelps v. Ellsworth*, 397

N

NECESSARIES.

1. Husband and wife were divorced by a decree of the legislature; alimony was allowed her, which was to be in lieu of all claims of dower; and she was constituted sole guardian of two of their infant children; held, that the father was liable for education and support of such children, furnished, in the first place, by her as guardian, and afterwards by a stranger, to whom she had been married. *Staunton v. Willson*, 37
2. Where an infant child elopes from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education furnished to such child by a stranger, *ib.*
3. What articles are necessities must depend upon the circumstances of the party for whom they are furnished, and when those circumstances are ascertained, the court will only instruct the jury as to the *classes* of articles which are to be considered as necessities, *ib.*
4. Book debt will lie for necessities furnished to an infant, without a re-

quest from the party liable, or a promise to pay for them. *Staunton v. Willson*, 37

### NEGLIGENCE.

An attorney may be liable for a debt lost by his negligence, but he is not of course liable for the loss of the evidence of that debt. And in a suit brought against him for such loss, he may show that the plaintiff had another remedy for the recovery of his debt, which he has successfully pursued. *Huntington v. Rumrill*, 390

### NEW TRIALS.

In 1707, the General Assembly of Connecticut had not so far parted with their judicial authority as to preclude them from awarding new trials in subordinate tribunals. *Hamilton v. Hempstead*, 332

### NEXT OF KIN.

By the statute of distributions, previous to the revision in 1784, real and personal property were placed upon the same footing; and the term "next of kin" had the same meaning, whether used with reference to one or the other. When used with reference to real estate, it never meant those only of the blood of the first purchaser. *Hillhouse v. Chester*, 166

### NON COMPOS MENTIS.

A man may show that he was non compos mentis in avoidance of his deed. *Webster v. Woodford*, 90

### NOTICE.

1. *A.* and *B.* of *New-York*, and *C.* of *Norwich*, in *Connecticut*, having been partners in trade, dissolved their

partnership, and published notice of such dissolution, for several weeks successively, in two newspapers, one printed at *Norwich*, which was their usual place of doing business, and the other at *New-London*, in the vicinity. *B.* afterwards endorsed a bill of exchange, in *New-York*, in the company name; but whether the endorsee had, or had not, actual notice of the dissolution did not appear; nor did it appear that he had ever been a correspondent of the company. Held, that these facts constituted reasonable notice to him, and to every other person not a correspondent of the company. *Mowatt v. Howland*, 353

2. The facts which are supposed to constitute notice of a dissolution of partnership being ascertained, it is a question of law whether the notice be reasonable, or not. *ib.*
3. In the assignment of a book debt, notice to the debtor is indispensable; for, until such notice is given, the property remains in the assignor's possession, and is liable for his debts. *Woodbridge v. Perkins*, 364
4. Putting a letter into the post-office, is a fact from which the jury may infer, that the person to whom it was addressed had notice of its contents. *Hartford Bank v. Hart*, 492
5. *A.* having made a conveyance of land to *B.* and *B.* to *C.*; and *D.* a creditor of *A.*, having attached the premises, in a suit against *A.*, and caused a copy of the attachment to be left in the town-clerk's office, before the conveyance from *B.* to *C.*, such copy is notice to *C.*, and to all the world, of *D.*'s claim to the premises. *Rathbone v. Riley*, 506

*Vide* USURY, No. 2.

### O

### OATH.

*Vide* WITNESS, No. 3.

OFFENCE.

1. Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. *Knowles v. State*, 103
2. If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplusage, and will not vitiate, *ib.*

OUSTER AND ADVERSE POSSESSION.

An actual ouster, and adverse possession, continued uninterruptedly for fifteen years, will bar the original proprietor of his right of entry, whether the ouster and adverse possession were by the same person or persons, for the whole term, or by different persons, for different portions of it. *Fanning v. Wilcox*, 258

P

PARENT AND CHILD.

Where an infant child elopes from his father, for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education furnished to such child by a stranger. *Staunton v. Willson*, 37

PARTNERSHIP.

1. In an action against *A.* and *B.*, as partners, on a contract executed in the partnership name, *A.* suffered a default, and *B.* pleaded the general issue: Held, that letters written by *A.* in the partnership name could not be read in evidence by *B.* to show that he was not a partner with *A.* *Champlin v. Tilley*, 306
2. In such case, an account book, containing entries made by *A.* and *B.* may go to the jury as evidence of partnership, *ib.*
3. *A.* and *B.* of *New-York*, and *C.* of *Nor-*

*wich*, in *Connecticut*, having been partners in trade, dissolved their partnership, and published notice of such dissolution, for several weeks successively, in two newspapers, one printed at *Norwich*, which was their usual place of doing business, and the other at *New-London*, in the vicinity. *B.* afterwards endorsed a bill of exchange in *New-York*, with the company name; but whether the endorsee had or had not actual notice of the dissolution did not appear; nor did it appear that he had ever been a correspondent of the company. Held, that these facts constituted reasonable notice to him, and to every other person not a correspondent of the company. *Mowatt v. Howland*, 353

4. The facts which are supposed to constitute notice of a dissolution of partnership being ascertained, it is a question of law whether the notice be reasonable, or not, *ib.*

PAUPER.

There being two parishes in the same town, a pauper resided in the first four years; he then removed to the second, and resided there six months, when it was incorporated into a distinct town; he remained there after the incorporation four years and six months, and then went away. Held, that he gained no legal settlement in the town last mentioned. *Inhabitants of Oxford v. Inhabitants of Woodbridge*, 224

PAYMENT.

Payment of a bond will not be presumed from lapse of time alone within a shorter period than twenty years. *Cottle v. Payne*, 289

PLEADING.

1. A declaration for labour done, or services performed, generally, is good. *Edwards v. Nichols*, 16
2. Usury may be given in evidence under the general issue. *Culver v. Robinson*, 68



3. In such case the defendant must give the plaintiff notice of the defence. *Culver v. Robinson*, 68
4. A man may show that he was non compos mentis, in avoidance of his deed. *Webster v. Woodford*, 90
5. If an offence punishable at common law is averred in the information to be contra formam statuti, such averment may be rejected as surplusage, and will not vitiate. *Knowles v. State*, 103
6. An information for an exhibition of a show, must particularly state the circumstances in which the indecency, barbarity, or immorality of it consists, that the court may judge whether it is an offence within the statute, tit. 116. s. 1. or at common law, *ib.*
7. Facts stated by way of inducement to a material traverse, are not traversable; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement. *Fowler v. Clark*, 231
8. *Quere*, whether after a plea of no award, a rejoinder of a revocation is a departure? *ib.*
9. An allegation in an indictment, which is not impertinent or foreign to the cause, must be proved, though a prosecution for the same offence might be supported without such allegation. *United States v. Porter*, 283
10. In an action on a promissory note for 80 dollars, to be paid in good West-India rum, sugar, or molasses, at the election of the payee, within eight days after date, it was held to be unnecessary to aver that the payee made his election, and gave notice thereof to the promisor, as the latter was bound, at all events, to make payment in one of the articles specified, within eight days, and on failure, became immediately liable. *Townsend v. Wells*, 327
11. An allegation that words charged as slanderous were known to the party and to the public in general to be true, is a sufficient allegation of their truth. *Sterling v. Adams*, 411
12. In an action for a vexatious suit, the plaintiff having stated, that in the original suit, he recovered his costs, alleged, that he was most unjustly imprisoned on said suit, for the space of twenty-four hours, and in defending the same expended large sums of money, to wit, the sum of 200 dollars in employing counsel to defend; also the sum of 200 dollars in paying witnesses, and maintaining them when attending on the trial; also the sum of 100 dollars in making various journeys to procure testimony, and in attending on the trial; without showing that such damages exceeded the costs recovered: Held, this was a sufficient allegation of damages. *Sterling v. Adams*, 411
13. If a plaintiff sues or pleads by conservator, and the record is in usual form, and judgment in his favour, it will be good; and those words will be rejected as surplusage. *Woodford v. Webster*, 472

## POSSESSION.

Vide TRESPASS, No. 1. 3.

## POST-OFFICE.

Vide EVIDENCE, No. 21.

## POWER.

1. A power to two executors to sell and dispose of an estate, in such way and manner as they shall judge most beneficial to the devisees, will not give one of them a power to sell, nor will it authorize one or both to enter upon and occupy the estate. *Bull v. Bull*, 384
2. A power to executors to sell and dispose of lands devised to the children of the testator, is a power to sell only, and ceases upon the death of one of the devisees. *Seymour v. Bull*, 388

## PRACTICE.

1. A motion for the appointment of a

- guardian to an infant party, must be in writing, and must state the name of the person proposed, and his consent to be appointed. *Hartshorn v. Sanford*, 279
2. An affidavit in support of a motion to put on a cause for the absence of a witness, cannot be explained by matters extrinsic. *Smith v. Barker*, 280
  3. Letters testamentary issued under the authority of one state, are not available in another. *Champlin v. Tilley*, 303
  4. But if to an action brought by an executor, on a cause of action arising in the life-time of the testator, the defendant plead the general issue, the plaintiff cannot be required, on trial, to produce any letters testamentary, *ib.*
  5. In an action on a joint contract against two, where one has suffered a default, and the other has obtained a verdict, judgment must be entered up for both. *ib.* 307
  6. After an affidavit in support of a motion for the continuance of a cause, on the ground of the absence of a material witness, has been made, the opposite party may make a counter-affidavit, stating any circumstances that render it impossible, or improbable, that the evidence of the witness can be obtained within a reasonable time; but such counter-affidavit must not deny the materiality of the evidence. *Anonymous*, 308
  7. An action sounding in tort against *A* an inhabitant of the state of *Rhode-Island*, and *B*, an inhabitant of this state, being brought to the county court, *A* did not appear, nor put in a plea, but *B* appeared and pleaded to the action, and judgment was rendered, at the first term, in favour of the defendants; the plaintiff then appealed to the superior court, and there had judgment in his favour: held, that the proceedings of the county court were void, and the judgment of the superior court erroneous, being rendered without regular process in the cause. *Stoyel v. Westcott*, 349
  8. Under the rule for the defendant's counsel to say whether he has a de-

fence, it is sufficient for the counsel to say, that his client has instructed him to defend, and he expects the cause will be tried, unless previously settled. *Terry v. Capen*, 495

9. A judgment which answers the issue, and on which execution was granted, will not be reversed because it did not say that the party should recover, and that execution should issue. *Bradley v. Clark*, 502

### PROBABLE CAUSE.

1. If in an action of slander the defendant admits the speaking of the words, but justifies on the ground that they were true, he does not thereby admit probable cause, so as to preclude him from showing the want of it, in an action for a vexatious suit. *Sterling v. Adams*, 411
2. A person may be liable for prosecuting, after he is of full age, a suit commenced by him maliciously, and without probable cause, while an infant, *ib.*

### PROBATE.

*Vide* LETTERS OF ADMINISTRATION.  
LETTERS TESTAMENTARY.

### PROCESS.

1. Serving a summons on any individual of a corporation is not sufficient notice to hold the corporation to trial. *Rand v. Bull*, 441
2. And the individual summoned may plead the want of notice to the corporation, *ib.*

### PROFITS.

1. An interest in the vessel and cargo gives an interest in the profits of the voyage, which may be the subject of insurance. *Fosdick v. Norwich Marine Insurance Company*, 108
2. In case of an insurance upon profits, and a total loss, no abandonment is necessary, *ib.*

## PROMISSORY NOTES.

1. An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be brought before the circuit court of the *United States*, though the maker and payee of such note are citizens of the same state. *Codwise v. Gleason*, 3
2. Though a note is void as against the maker, it may be good against an endorser, in favour of an endorsee, who took it, relying upon the endorsement. *Ib.* 12
3. The contract made by endorsement extends to all future endorsees, even where notes are not negotiable, *ib.*
4. Whether, in an action by the endorsee of a negotiable note against the maker, a discharge by the payee shall be available as a defence, until it be shown by the maker that the receipt was given before the endorsement was made? *Stuart v. Greenleaf*, 311
5. In an action by the endorsee of a promissory note against the defendant as endorser, on the ground, that though the endorsement was a forgery, yet he had made it his own; and it having been proved that his name had been forged on *other notes* discounted at the bank, of which he had had notice, he cannot be permitted to prove that the names of *other persons* had been forged under similar circumstances, of which *they* had had notice. *Hartford Bank v. Hart*, 493
6. Where there are several endorsors of a promissory note, they are, in general, liable to each other, in the order of their respective endorsements. *Talcott v. Cogswell*, 512
7. *A.* being indebted to *B.* by note, and proposing to pay part by a new note, makes his note payable to *C.*, and then procures *C.*, and afterwards *D.* to endorse it for *A.*'s accommodation; the note becoming due, after having been accepted by *B.* and discounted for him at the bank, *A.* fails to take it up, and *C.* and *D.* after notice of such failure, come sepa-

rately to the bank, and take it up, each paying a moiety. In an action, brought more than three years afterwards, by *D.* against *C.* to recover back the money paid by *D.* on the note, these circumstances furnish sufficient evidence that the endorsement by both was joint, and each having paid what in that case each would be compellable to pay, no recovery can be had. *Talcott v. Cogswell*, 512

## R

## REGULÆ GENERALES.

1. Rules of practice adopted May 26th, 1807, 28
2. Rules adopted June term, 1808, 29.

## RELEASE.

4. conveyed to *B.* with covenants of seisin and warranty, a piece of land containing thirteen acres, bounded north and south by undisputed limits, east by the land of *C.*, and west by that of *A.* In an action of trespass *quare clausum fregit*, brought by *B.* against *C.* to which the defendant pleaded title, claiming that the dividing line between his land and that conveyed to the plaintiff was west of the *locus in quo*, *A.* was offered as a witness to disprove the defendant's claim, after a release from the covenants in his deed had been executed by the plaintiff to him: Held, that *A.* was an incompetent witness, being interested to establish the dividing line as far eastward as possible, and that the release did not restore his competency, as the covenants in his deed run with the land. *Abby v. Goodrich*, 433

## REPRESENTATION.

4. insured 6,000 dollars, as profits on a cargo, at and from *Bordeaux* to the



*West Indies.* At the time of effecting the insurance, *A.* represented to the insurers, that he had received advice from his correspondent at *Bordeaux*, of the vessel's arrival there, and of the state of the market, and that it was expected a cargo would be obtained worth from 20,000 to 25,000 dollars. The vessel actually sailed with a cargo worth but 9,251 dollars. Held, there was no misrepresentation. *Fosdick v. Norwich Marine Insurance Company*, 108

## REVOCATION.

*Vide JURISDICTION*, No. 3.

## RULE OF DAMAGES.

In an action of trespass, for taking and detaining a ship, it was held, that the plaintiff was entitled to give in evidence a process in replevin by *C.* a third person, a replevin bond by *D.* and *E.*, as sureties, and a judgment thereon in favour of the defendant, and to prove that he, the plaintiff, had indemnified those sureties, for the purpose of showing that he became liable to the defendant for the amount of his claim against *C.*, and that this sum ought to be the rule of damages. *Bird v. Clark*, 272

## RULES.

*Vide REGULE GENERALES.*

## S

### SEAMEN.

The master of a vessel has a right, during the voyage, to punish his mariners, by corporal chastisement, for disobedience to any of his reasonable commands, and for insolence, and other offences. *Michaelson v. Dennison*, 294

## SEISIN.

The maxim *seisina facit stipitem* has never been adopted in this state; but on the death of the ancestor, the descent is cast upon the heir, without any reference to the actual seisin of such ancestor. *Hillhouse v. Chester*, 166

## SELECTMEN.

*Vide IDLE PERSONS. EVIDENCE*, No. 6.

## SERVICE.

1. Serving a summons on any private individual of a corporation is not sufficient notice to hold the corporation to trial. *Rand v. Bull*, 441
2. And the individual summoned may plead the want of notice to the corporation, *ib.*

## SETTLEMENT.

There being two parishes in the same town, a pauper resided in the first four years; he then removed to the second, and resided there six months, when it was incorporated into a distinct town; he remained there after the incorporation four years and six months, and then went away. Held, that he gained no legal settlement in the town last mentioned. *Inhabitants of Oxford v. Inhabitants of Woodbridge*, 224

## SHOW.

Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. *Knowles v. State*, 103

## SLANDER.

An allegation that words charged as slanderous, were known to the party

and to the public in general, to be true, is a sufficient allegation of their truth. *Sterling v. Adams*, 411

### STATUTES OF CONNECTICUT.

1. An information for an exhibition of a show, must particularly state the circumstances in which the indecency, barbarity or immorality of it consists, that the court may judge whether it is an offence within the statute, title 116. section 1. or at common law. *Knowles v. State*, 103
  2. The statute, tit. 83 c. 1. authorizing the selectmen to take into their care and custody the persons and property of persons likely to be reduced to want, by idleness, mismanagement, or bad husbandry, must have a strict construction, and be strictly pursued. Therefore, where the selectmen, having taken the property of a person of that description, neglected to set up a certificate of their doings, and to make and lodge in the town-clerk's office an inventory of the property taken; pursuant to the provisions of the 12th section, it was held, that they could not retain such property, and that the owner, after demand and refusal, was entitled to recover against them in trover. *Knapp v. Lockwood*, 131
  3. By the statute of distributions, previous to the revision in 1784, real and personal property were placed upon the same footing; and the term "*next of kin*" had the same meaning, whether used with reference to one or the other. When used with reference to real estate, it never meant those only of the blood of the first purchaser. *Hillhouse v. Chester*, 166
- Vide* BOOK DEBT, No. 1. SETTLEMENT. LIMITATIONS, STATUTE OF JURY, No. 2 ESTATE-TAIL. JUDGMENT, No. 3. EVIDENCE, No. 20.

### STATUTES OF THE UNITED STATES.

*Vide* CIRCUIT COURT OF THE UNITED STATES, No. 1. COPY-RIGHT, No. 2. BANKRUPT, EMBARGO.

### SUCCESSORS.

*Vide* CORPORATION, No. 3. *Bierre v. Kellogg*, in note, 455

### SUMMONS.

1. Serving a summons on any private individual of a corporation is not sufficient notice to hold the corporation to trial. *Rand v. Bull*, 441
2. And the individual summoned may plead the want of notice to the corporation, *ib.*

### SUPERIOR COURT.

How constituted, 27, 28  
*Vide* JURISDICTION, No. 3.

### SUPREME COURT OF ERRORS.

How constituted, *ib.* 27, 28

### SURPLUSAGE.

1. If an offence punishable at common law is averred in the information to be *contra formam statuti*, such averment may be rejected as surplusage, and will not vitiate. *Knowles v. State*, 103
2. If a plaintiff *sues or pleads by conservator*, and the record is in the usual form, and judgment in his favour, it will be good; and those words will be rejected as surplusage. *Woodford v. Webster*, 472

### T

### TIME.

In a policy of insurance, the clause

"prior in date," referring to other policies upon the same risk, is equivalent with *prior in time*. *Brown v. Hartford Insurance Company*, 58

### TOTAL LOSS.

In case of insurance upon profits, and a total loss, no abandonment is necessary. *Fosdick v. Norwich Marine Insurance Company*, 108

### TOWN, INHABITANTS OF.

*Vide* EVIDENCE, No. 4, 5.

### TRAVERSE.

Facts stated, by way of inducement to a material traverse, are not traversable; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement. *Fowler v. Clark*, 231

### TRESPASS.

1. The owner of personal property, though not in possession, may maintain trespass against a stranger. *Bird v. Clark*, 272
2. In trespass *vi et armis*, the damages are not limited by the value of the property destroyed. *Edwards v. Beach*, 447
3. A constructive possession in the plaintiff is sufficient to enable him to maintain trespass. *Williams v. Lewis*, 498

*Vide* EXECUTION.

### TROVER.

The statute, tit. 88. c. 1. authorizing the selectmen to take into their care and custody the persons and property of persons likely to be reduced to want, by idleness, mismanagement, or bad husbandry, must have a strict construction, and be strictly pursued.

Therefore, where the selectmen,

having taken the property of a person of that description, neglected to set up a certificate of their doings, and to make and lodge in the town clerk's office an inventory of the property taken, pursuant to the provisions of the 12th section, it was held, that they could not retain such property, and that the owner, after demand and refusal, was entitled to recover against them in trover. *Knapp v. Lockwood*, 131

## U

### UNITED STATES COURT.

1. An action in favour of the endorsee of a promissory note, a citizen of one state, against the endorser, a citizen of a different state, may be brought before the circuit court of the *United States*, though the maker and payee of such note are citizens of the same state. *Codwise v. Gleason*, 3
2. If a party is described as a citizen of the *district of New-York*, he is sufficiently described as a citizen of the *state of New-York*. *Edwards v. Nichols*, 16

### USAGE.

In an action against the owners of a vessel, for a quantity of gold and silver coin, taken by the master at *Nevis*, on freight, evidence of a custom of merchants in *Connecticut* and *New-York*, that the freight of money received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners, was held to be admissible. *Halsey v. Brown*, 346

### USURY.

1. Usury may be given in evidence under the general issue. *Culver v. Robinson*, 68
2. In such case the defendant must



give the plaintiff notice of the defence. *Culver v. Robinson*, 68

*Vide REGULA GENERALIS*, 278

3. A corrupt agreement in which the minds of the parties meet, is necessary to constitute usury. Therefore, where more than lawful interest was reserved with the knowledge of the lender, but without the knowledge of the borrower, it was held, that the transaction was not usurious. *Smith v. Beach*, 268
4. If a usurious security be given up, and a new security taken for the principal sum due, and legal interest, the latter will be good. *Kilbourn v. Bradley*, 356
5. The moral obligation, which the borrower of money at usurious interest is under, to pay the principal sum due, and legal interest, is a sufficient consideration to support a promise by him to pay such principal and interest, *ib.*

## V

### VARIANCE.

1. In *indebitatus assumpsit* for money paid to the defendants' use, the declaration stated, that an execution had been issued against the defendants, inhabitants of the town of *Newtown*, for taxes; that property had been taken thereon, for which the plaintiff had given his receipt; and that in consequence thereof, he had been eventually compelled to pay this money in satisfaction of said taxes. At the trial, evidence was produced of an execution against the collector. Held, that this was no material variance. *Beers v. Botsford*, 159
2. Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, it was held, that the variance was fatal. *Smith v. Barker*, 312

## VERDICT.

*Vide JURY*, No. 2, 3.

### VEXATIOUS SUIT.

1. If in an action of slander, the defendant admits the speaking of the words, but justifies on the ground that they were true, he does not thereby admit probable cause, so as to preclude him from showing the want of it in an action for a vexatious suit. *Sterling v. Adams*, 411
2. A person may be liable for prosecuting, after he is of full age, a suit commenced by him maliciously, and without probable cause, while an infant, *ib.*
3. In an action for a vexatious suit, the plaintiff having stated, that in the original suit, he recovered his costs, alleged, that he was most unjustly imprisoned on said suit, for the space of twenty-four hours, and in defending the same expended large sums of money, to wit, the sum of 200 dollars in employing counsel to defend; also the sum of 200 dollars in paying witnesses, and maintaining them when attending on the trial; also the sum of 100 dollars in making various journeys to procure testimony; and in attending on the trial; without showing that such damages exceeded the costs recovered: Held, this was a sufficient allegation of damages. *Sterling v. Adams*, 411

## VOIRE DIRE.

*Vide WITNESS*, No. 3.

## W

### WITNESS.

1. In *assumpsit*, though for articles and services commonly charged on book, the parties cannot be permitted to testify. *Edwards v. Nichols*, 16

A wife may be a witness for her husband in an action of book debt, especially after his death, though the charges accrued in his life-time.

*Staunton v Willson*, 37

When a witness has been examined by the party against whom he is called, as to his interest in the event, other witnesses cannot be inquired of as to his interest; and it makes no difference whether such examination was under the general oath, or the *voir dire*; nor whether it was in court, or before a magistrate, taking a deposition out of court. *Butler v.*

*Butler*, 214

A. conveyed to B. with covenants of seisin and warranty, a piece of land containing thirteen acres, bounded north and south by undisputed limits, east by the land of C., and west by that of A. In an action of trespass *quare clausum fregit*, brought by B. against C., to which the defendant pleaded title, claiming that

the dividing line between his land and that conveyed to the plaintiff, was west of the *locus in quo*, A. was offered as a witness, to disprove the defendant's claim, after a release from the covenants in his deed had been executed by the plaintiff to him: Held, that A. was an incompetent witness, being interested to establish the dividing line as far eastward as possible, and that the release did not restore his competency, as the covenants of his deed run with the land. *Abby v. Goodrich*, 433

*Vide* JURY, No. 4.

### WRIT OF ERROR.

A writ of error cannot be brought by one only of several respondents to a bill in chancery, against whom a decree has been passed; but all must join. *Phelps v. Ellsworth*,

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END OF THE THIRD VOLUME.









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